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# Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts

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## Articles

### **Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts**

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#### Introduction

Look at this picture of a woman. Is she old or young? The image contains both; what you see will depend on where you

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focus your attention.<sup>1</sup> Now that you know there are two women in the picture, look again to see the other one. After you have found the second figure, you are unlikely to view the illustration as you did originally; your eye alternates between the two images. Once you have that information about the drawing, it is not possible to erase that knowledge from your mind; your perception is unalterably changed.

This inability to ignore information and its effect on subsequent experience has parallels in lesbians' and gay men's<sup>2</sup> treatment in the courts. Once sexual orientation becomes visible, it

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1. British cartoonist, W.E. Hill, created this version of a famous multistable figure. W.E. Hill, *My Wife and My Mother-in-Law*, PUCK, Nov. 11, 1915, at 16; see Eric W. Weisstein, *Young Girl-Old Woman Illusion*, MATHWORLD (A Wolfram Web Resource), <http://mathworld.wolfram.com/YoungGirl-OldWomanIllusion.html> (last visited Jan. 27, 2007). The old woman is looking to the left. Her mouth is the young woman's necklace; her eye is the young woman's ear. The young woman is facing away from you to the left. Her nose seems to be a wart on the old woman's nose or part of her eye. In a multistable figure the brain adopts first one image, then another, competing image; they alternately supplant each other. See Thomas V. Papathomas, *The Brain as a Hypothesis-constructing-and-testing Agent*, in WHAT IS COGNITIVE SCIENCE? 230, 235 (Ernest Lepore & Zenon Pylyshyn eds., 1999).

2. I use "lesbians and gay men" to refer to women and men whose sexual orientation is same-sex and "gay" or sexual minorities when referring to same-sex persons generally—illustrating that gender often, but not exclusively, mediates the experience of same-sex orientation. See Todd Brower, "A Stranger to Its Laws: Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy," 38 SANTA CLARA L. REV. 65, 65 n.2 (1997) [hereinafter Brower, *Stranger*]. Accord Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians And Gay Men*, 46 U. MIAMI L. REV. 511, 535-36 (1992). Race also influences sexual orientation identity. See, e.g., Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997). Additionally, "LGBT" is a shorter version of the more proper descriptor "lesbian, gay, bisexual and transgendered." For more on "gay," see Alison Bechdel, *Dykes to Watch Out*

significantly affects the experiences of both lesbian and gay court users and court employees. Thus, the judicial system is sometimes hostile and sometimes more tolerant. Second, similar to the opening illusion in which the same drawing contains two complete images, the courts are multiple environments in which sexual minorities function. Courtrooms, clerks' offices, judicial chambers, common areas are not only legal institutions, but also private and public workplaces. We may perceive the courts in more than one way at the same time. Third, just as two individuals can look at an identical multistable figure but see divergent images, two persons can experience identical events in court in radically different ways based on the individual's sexual orientation. Indeed, the disparate perceptions of the judicial system can sometimes be quite striking. This combination of diverse environments, different perceptions, and varying degrees of sexual orientation disclosure complicates analysis of sexual minorities' experiences with the judicial system.<sup>3</sup>

The more LGBT rights issues are debated in society, the more the significance of this empirical analysis increases. One problem for sexual minorities is that judges<sup>4</sup> and legislators<sup>5</sup>

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For #368 (2001) (comic strip), available at <http://icq.planetout.com/entertainment/comics/dtwof/archive/368.html>.

3. See, e.g., M.V. Lee Badgett, *Employment and Sexual Orientation: Disclosure and Discrimination in the Workplace*, in *SEXUAL IDENTITY ON THE JOB: ISSUES AND SERVICES* 22, 37-38 (Allen L. Ellis & Ellen D.B. Riggle eds., 1996).

4. See, e.g., *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 126 S. Ct. 1297 (2006); *Lawrence v. Garner*, 539 U.S. 558 (2003); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Lofton v. Sec. of the Dep't of Children and Family Services*, 377 F.3d 1275 (11th Cir. 2004) (discussing adoption); *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2004); *Dep't of Human Servs. v. Howard*, No. 05-814, 2006 Ark. LEXIS 918 (Ark. June 29, 2006); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. 2005); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (discussing marriage); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

5. See, e.g., *Defense of Marriage Act (DOMA)*, Pub. L. No. 104-199, 110 Stat. 2419 (1996); CAL. FAM. CODE §§ 300-301, 308.5 (West 2006); *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005) (discussing Nebraska Constitutions Article I, § 29); Cheryl Wetzstein, *Governor pushes law for foster parents; Arkansas ruling leaves door open to restrictions on gay households*, THE WASHINGTON TIMES, July 2, 2006, at A2 (discussing a legislative proposal to ban same-sex adoptions in Arkansas); Richard Fausset, *The Nation; Bi-National Gay Couples in Immigration Bind; Advocates say Same-Sex Partners Facing being Separated Should Have Same Rights as Spouses*, LOS ANGELES TIMES, June 10, 2006, at A5 (discussing the Uniting American Families Act); E.J. Graff, *Doubt*

often lack concrete, factual information on the personal experiences and treatment of gay people. Without knowing what the particular problems are, it is difficult to craft effective or appropriate solutions. Moreover, courts and tribunals will eventually interpret most of those issues and laws. Nevertheless, the judiciary barely knows how it treats its own workers or those members of the public who use the courts. Little empirical evidence exists on the day to day experiences of LGBT individuals in the legal system.

This article begins to fill this gap. It examines the results of all the studies of LGBT persons' experiences with the judicial system and analyzes common patterns among the research.<sup>6</sup> After examining the various survey designs and respondents' demographic characteristics, the article explores how visibility of minority sexual orientation affects the perceptions, personal experiences and treatment of court users and employees. The article also references behavioral and economic research on LGBT persons at work and in other settings to show the similarities and differences between gay persons' interactions with judicial systems and with other social institutions.

### I. Visibility and Invisibility – Disclosure and Hiding

Most lesbians or gay men are not visibly identifiable.<sup>7</sup> Accordingly, the revelation of minority sexual identity usually oc-

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*Less*, THE NEW REPUBLIC, October 3, 2005, at 9 (discussing the California legislature's passage of same-sex marriage and Governor Schwarzenegger's veto); Margaret Krome, *Gay Marriage Proposals Carry The Message of Hate*, THE CAPITAL TIMES, June 7, 2006, at A10; Employment Equality Regulation, 2003, SI 2003/1661 (UK); Employment Equality Regulation, 2003, SN 2003/947 (UK) (effective for Northern Ireland).

6. This article is descriptive and not prescriptive; it reviews the court experiences of LGBT persons but does not always provide legal or political consequences or reforms required by that treatment.

7. Contrary to many people's beliefs, non-gay persons often cannot identify lesbians or gay men who do not disclose their sexual orientation. WARREN J. BLUMENFELD & DIANE RAYMOND, LOOKING AT GAY AND LESBIAN LIFE 86 (1993); Badgett, *supra* note 3, at 34-35. However, one study suggested that "gaydar," the supposed ability of gay people to recognize other sexual orientation minorities, may have some factual basis. See, e.g., Willow Lawson, *Queer Eyes: Blips on the Gaydar*, PSYCHOLOGY TODAY, Nov./Dec. 2005, available at <http://www.psychologytoday.com/articles/pto-20051018-000007.html> (reporting on the senior thesis of Harvard undergraduate, William Lee Adams).

curs through speech or communicative conduct<sup>8</sup> in order to affirmatively break the assumption of heterosexuality that silence often brings.<sup>9</sup> This assumption allows some gay people to hide their identity and avoid the negative consequences of being open.<sup>10</sup> Nevertheless, hiding is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality.<sup>11</sup> A lesbian or gay attorney surveyed in Los Angeles disclosed: "I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say 'we' and risk someone asking who 'we' is . . . . [I]f someone asks, 'What happened this weekend?' and I slip and [say] 'we' instead of 'I,' then I go through a kind of turmoil. That really requires energy that . . . prevents you . . . from achieving any peace and assurance."<sup>12</sup>

In addition, silence about one's self-identity reinforces lesbian and gay marginalization because it requires gay people to

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8. William N. Eskridge, Jr., Symposium, *Group Conflict and the Constitution: Race Sexuality, and Religion: A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collision of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2442 (1997). Sexual orientation is complex and may be measured by identity or behavior; in the workplace, identity is often the salient characteristic. Badgett, *supra* note 3, at 35.

9. Adrienne Rich calls this assumption and its consequences, "compulsory heterosexuality." Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al., eds., 1983).

10. DOMINIC J. BREWER & MARYANN JACOBI GRAY, SEXUAL ORIENTATION FAIRNESS IN CALIFORNIA COURTS 21 (2000) [hereinafter BREWER & GRAY, SURVEY DATA] ("I did not tell the truth about having a partner because I was not comfortable being 'out' in that setting. I pretended I was single – then 'passed' for heterosexual."); accord LOS ANGELES COUNTY BAR ASSOCIATION COMMITTEE ON SEXUAL ORIENTATION BIAS, REPORT 27 (1994) [hereinafter LA BAR REPORT] (noting that "most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream.").

11. Jane Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 371 (1997).

12. LA BAR REPORT, *supra* note 10, at 28 n.181 (citing a response from a gay or lesbian attorney surveyed). To see how difficult hiding one's sexual orientation identity is, try the thought experiment in Brower, *Stranger*, *supra* note 2, at 65 n.1. "I joined the Rainbow Network on the pretext of being a 'friend' whereas I am a full member but not 'out'. I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable & I was able to see people's reaction as if it is assumed I was totally straight & why was I joining supporting this bunch of 'weirdos'" BROWER, 2003 UK REPORT, *infra* note 47, at 59-60 (Open-ended comments, Q10).

deny an essential difference between them and others.<sup>13</sup> They may not share in everyday social interactions at work or in other contexts because they must mask certain aspects of their lives.<sup>14</sup>

Thus, open self-identity is more significant for lesbians and gay men than it is for non-gay persons.<sup>15</sup> The non-gay person may not feel any pressure to voice her sexual orientation explicitly.<sup>16</sup> She may use any of the many ways in which this fact is

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13. For a more complete discussion of consequences, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989). See also Eskridge, *supra* note 8, at 2442-43. For further discussion within this article, see *infra* note 28 and accompanying text.

14. See, e.g., LA BAR REPORT, *supra* note 10, at 31-34. "[At social events] gay and lesbian attorneys are most likely to feel and be perceived as 'different' – usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious . . . not fitting in." *Id.* at 33 (quoting response from a gay or lesbian attorney respondent). Accord Janie Ho, *Attracting Gay MBAs*, BUSINESSWEEK ONLINE, Aug. 8, 2006 (quoting lesbian Price-WaterhouseCoopers employees). Also, some lesbians or gay men do not fit neatly into the standard categories of married or single, an often important distinction for courts and other government agencies or benefits. For a further discussion of the interaction of visibility and LGBT persons' abilities to be integrated into society and social organizations, see Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565 (2001).

15. Eskridge, *supra* note 8, at 2442.

16. We almost never think about the myriad ways in which non-gay people are open about their sexual orientation. Indeed, the strangeness of the expression "openly non-gay" to describe heterosexuals' sexual orientation identity illustrates how little we consider the public nature of heterosexuality.

When a heterosexual couple kisses in public, it is not viewed as a statement about sexual orientation. Conversely, when gay people engage in those same activities, it is often perceived as flaunting their sexuality. See, e.g., *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 249 (9th Cir. 1976); accord BROWER, 2003 UK REPORT, *infra* note 47, at 37 ("Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited)."). The 'fear of flaunting' has often justified negative employment or other consequences for LGBT individuals. See, e.g., *Singer*, 530 F.2d at 249; *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997); see also LA BAR REPORT, *supra* note 10, at 5-40 (describing the consequences of being an openly lesbian or gay attorney in Los Angeles County); accord Jacquie McNish, *Can Lawyers Be Too Gay?*, GLOBE AND MAIL, June 14, 2006, <http://www.globeinvestor.com/servlet/story/RTGAM.20060614.wxlawcolumn14/GIStory/> (describing the criticism of an openly gay male Vancouver attorney in a "gay-friendly" workplace for being too open and his subsequent resignation).

In the United States, using affirmative communication to self-identify as LGBT has meant that courts have often viewed lesbian or gay identity under the First Amendment to the United States Constitution. See generally Brower, *supra*

normally communicated, by displaying pictures of a spouse or children at work,<sup>17</sup> by using the pronoun “we” to describe daily activities,<sup>18</sup> or simply by allowing people to presume that she is heterosexual.

These decisions are intuitive or unconscious for heterosexuals; gay persons must deliberately decide what to say or do, how much to disclose or allow to remain unspoken.<sup>19</sup> Consequently, the metaphor ‘coming out of the closet’ is misleading. We literally exit a closet into a room all at once. We are either in one place or another, in a closet or out. Unlike that literal decision to leave a closet and the binary options it implies, publicly ac-

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note 14. For a discussion of how same-sex marriage prohibitions erase gay and lesbian identity, see Tobias B. Wolff, Symposium, *Current Debate in the Conflict of Laws: Recognition and Enforcement of Same-Sex Marriage: Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2245-2249 (2005).

17. The LA BAR REPORT found that nearly one half of all respondents, regardless of sexual orientation and sex, believed that simply discussing one’s personal or family life in a manner that revealed the sex of one’s partner—a matter of no consequence for non-gay attorneys—would harm a gay or lesbian attorney’s career. LA BAR REPORT, *supra* note 10, at 31.

18. See John Biewen & Robert Siegel, *Gay Teacher Files First Amendment Lawsuit in Utah*, ALL THINGS CONSIDERED (NPR), Oct. 21, 1997 (discussing lesbian coach and teacher threatened by school district with termination from tenured position if she talked about her sexual orientation or life with students, staff, parents).

19. See, e.g., Dave Cullen, *A heartbreaking decision*, SALON.COM, June 7, 2000, <http://www.salonmagazine.com/news/feature/2000/06/07/relationships/print.html> (describing a Marine captain who originally created a separate gay life in Denver, Colorado, USA, 70 miles away from the ‘gay-free zone’ of Colorado Springs where he was stationed).

He loosened those ties [with non-gay friends] by convincing his work friends that he found Colorado Springs stifling, and shifted all his free time to Denver, routinely spending three to five nights a week up there. But the constant questions of his juggling strategy still dog him . . . ‘you been up to? What did you do this weekend? . . . [R]equiring an elaborate fictional life. ‘I have to be careful,’ Alex says. ‘I have to be guarded when I come back from a weekend and start talking about where I’ve been or what I’ve done.’ He has spent enough time in Denver’s straight clubs to swap them with the gay bars; dates and tricks are converted to feminine counterparts. ‘I try to keep it as close to the truth as possible, because if I have to retell the story, I’m not going to stumble over things,’ he says. ‘If some guy has a broad chest, she’s got a rack. A guy named Clay becomes Claire. Everything else pretty much stays the same.’

*Id.*; LA BAR REPORT, *supra* note 10, at 28 n.181. For academic insights on negotiating these boundaries, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 15 (1959); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 287 (1995).



knowledging one's identity as lesbian or gay is a continuing set of choices for LGBT persons that must be calibrated according to the setting, comfort level, and assessment of the consequences.<sup>20</sup> Disclosure is often made first to trusted individuals and in a safe environment.<sup>21</sup> Thus, one can be open about sexual orientation to friends or family, but not at work,<sup>22</sup> or open to other lesbians or gay men, but not to non-gay people.<sup>23</sup> Alternatively, one may answer a direct question about sexual orientation, but not volunteer information.<sup>24</sup> Researchers must not only know if someone is open or closeted, but to whom and in what context.

Visibility is important to integration into the courts and other societal institutions, into the workplace, and to self-worth generally. It forms an additional dimension in the study of LGBT court experiences that is typically irrelevant to the treatment of other diverse populations like race or gender.<sup>25</sup> However, while it is particularly significant for LGBT persons, it is not exclusive to them. Adherents to non-minority religions and

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20. See, e.g., Belle Rose Ragins & John M. Cornwell, *Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination Against Gay and Lesbian Employees*, 86 J. OF APPLIED PSYCH. 1244, 1256 (2000); see also Badgett, *supra* note 3, at 50 n.5 (stating that disclosure is not a binary model and showing different types); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

There are different tradeoffs for disclosure in various environments. M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 727 (1995). For examples of workplace tradeoffs, see JAMES D. WOODS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 216-222 (1993). For more literary examples of coming out stories and the individual choices that those gay persons made, see *BOYS LIKE US: GAY WRITERS TELL THEIR "COMING OUT" STORIES* (Patrick Merla ed., 1996).

21. See, e.g., Belle Rose Ragins et al., *Heterosexism in the Workplace: Do Race and Gender Matter*, 28 GROUP & ORG. MGT. 45, 46 (March 2003).

22. See *supra* note 19 and *infra* note 61 and accompanying text; accord *infra* note 149 and accompanying text (discussing the percentage of respondents open to friends or family compared to open in court).

23. Cf. Eskridge, *supra* note 8, at 2439-40 (1997) (stating that by 1960, some lesbians or gay men equated coming out with talking to non-gays about one's sexual orientation and that coming out means talking to people who do not share one's sexual orientation, not just those who do).

24. E.g., *Debate Over Grade School Teacher Divulging He's Gay*, S.F. EXAMINER, June 11, 2000, at A3.

25. See generally TODD BROWER, REPORT ON THE POSSIBLE COMPARISONS BETWEEN THE RAINBOW NETWORK SURVEY (2003) AND THE PROUD NETWORK SURVEY (DCA London 2003) (on file with author) (discussing the two reports); see also *infra* note 41 and accompanying text.

persons with invisible disabilities may also share these concerns.<sup>26</sup>

As the court experiences of lesbians and gay men demonstrate, visibility is a key to understanding the survey data. Some respondents took little ameliorative action when faced with discrimination because they feared being forced to disclose their sexuality.<sup>27</sup> Remaining silent caused other lesbians and gay men to feel that they deceived others in court and elsewhere.<sup>28</sup> Others were counseled to obscure their sexual orientation or criticized for disclosure.<sup>29</sup> Indeed, some sexual minorities may have wished to be open, but others in the courts forced them to stifle their non-majority identity.<sup>30</sup>

This latter option, being nominally open as LGBT but minimizing the differences between minority and majority sexual orientation, is an alternative approach to passing as heterosex-

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26. See, e.g., Simon Sebag-Montefiore, *Being a Jew is dangerous now*, THE EVENING STANDARD (London), June 25, 2004, at A30 (describing being a Jew in Great Britain and other people's reactions to his Jewishness); WORKPLACE ACCOMMODATIONS FOR PEOPLE LIVING WITH MULTIPLE SCLEROSIS (Susanne M. Bruyere ed., 2001), available at [http://www.ilr.cornell.edu/extension/files/download/Multiple\\_Sclerosis.pdf](http://www.ilr.cornell.edu/extension/files/download/Multiple_Sclerosis.pdf) (describing the hidden disability of MS and workplace accommodations).

27. "I took relatively little action as I was worried & still am that people would guess / find out about my transsexuality as I am not out & may not be ready to be out at work for fear of widespread ridicule & prejudice. I saw & heard the reaction to someone who now presents as a woman in HQ." BROWER, 2003 UK REPORT, *infra* note 47, at 39 (open-ended comments, Q15).

28. "The judge asked all prospective jurors to state marital status and what their spouse's occupation was. I have a long-term domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner's occupation even though legally my marital status is single. Stating 'single' would have felt like lying." DOMINIC J. BREWER & MARYANN JACOBI GRAY, REPORT ON SEXUAL ORIENTATION FAIRNESS IN CALIFORNIA COURTS 33 (1999) [hereinafter BREWER & GRAY, REPORT].

29. NEW JERSEY REPORT, *infra* note 45, at 44, 48 (questions 18-19); see also BROWER, 2003 UK REPORT, *infra* note 47, at 30. 41.7 percent of Rainbow Network members believed that it was unsafe, 26.1 percent that it was preferable to hide their orientation (see Tables 29b and 29k); 57.9 percent of all California court employees believe it is better if gay men and lesbians are not open about their sexual orientation, and 29.5 percent believe that being openly gay is unsafe. BREWER & GRAY, REPORT, *supra* note 28, at 70 (table 48).

30. "Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited)." BROWER, 2003 UK REPORT, *infra* note 47, at 37 (open-ended comments Q17).

ual or being completely visible.<sup>31</sup> A lesbian employee may decide to not respond to anti-gay comments that negatively affect her<sup>32</sup> or may not publicly attend workplace social events with her same-sex partner.<sup>33</sup> By underplaying her sexual orientation, she may allow others to ignore that difference and be more comfortable with her in the workplace.<sup>34</sup> Significantly, visibility as a lesbian, gay man or bisexual depends on both the choices that gay people make and the understandings of their non-gay peers.<sup>35</sup>

Like the opening multistable figure, this lesbian employee's actions can be perceived in competing ways. Whether this strategy is viewed as passing as non-gay or minimizing her sexuality depends on her co-workers' knowledge. For people who know she is a lesbian, her inaction allows them to forget that fact; for those who are unaware, they may assume that she is heterosexual.<sup>36</sup> This alternative is particularly important for lesbian and gay male court employees whose minority sexuality

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31. See, e.g., Yoshino, *supra* note 20, at 772-73. For covering in the non-sexuality context, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (1999). Much of the writings on this strategy stem from sociologist, Erving Goffman. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 102-04 (1963).

32. See, e.g., BROWER, 2005 UK REPORT, *infra* note 47, at 54-55 ("Did not want to approach person as I work opposite them and felt I could ignore it. The comment was about others not myself. Spoke to another member of staff, a friend, as I was upset but took no further action 'to keep the peace'." "negative comments / jokes about gay/transsexual people in particular are common at work and you are a troublemaker if you don't keep your head down or join in with the 'joke' - or you are very 'p.c' - and as a result not 'one of the group'").

33. See, e.g., LA BAR REPORT, *supra* note 10, at 33 ("[At social events] gay and lesbian attorneys are most likely to feel and be perceived as 'different' - usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious . . . not fitting in."); see also Yoshino, *supra* note 20, at 772.

34. Accord McNish, *supra* note 16 (describing the resignation of an openly gay male Vancouver attorney and the different gradations of openness for gay and lesbian lawyers). For a similar action with race, see Erin A. Kaplan, *The Roots of Racial Pride*, LOS ANGELES TIMES, July 12, 2006, at B13 (discussing the meaning of straight/good and kinky/bad hair for African-Americans).

35. See Carbado & Gulati, *supra* note 31, at 1264 n.8.

36. Yoshino, *supra* note 20, at 772-773 (citing Goffman, *supra* note 31, at 50-51).

may be known because of their extended contact with colleagues, but who may opt to make it salient or insignificant.<sup>37</sup>

Finally, the non-observability of sexual orientation may also affect heterosexuals' identity and their court experiences. Minority sexual orientation may provoke an associative stigma because sexual orientation is non-obvious; confusion or misattribution is possible with sexuality unlike with race or sex. Thus, heterosexuals may be reluctant to associate with gay people because they fear misattribution as a sexual minority.<sup>38</sup> For example, some court users or employees did not report negative treatment of others based on sexual orientation to avoid being

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37. These strategies may not always be successful or under the employee's control. David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1956 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999) (stating that despite efforts to downplay race, African-American attorneys were always seen as the "Black lawyer.")); see also Brower, *supra* note 14, at 627 n.142 (citing Amy Harmon, *How Race Is Lived in America: A Limited Partnership*, N.Y. TIMES, June 14, 2000, at A1. (contrasting the experiences of Timothy Cobb, a black internet entrepreneur, with those of his former white partner, Jeff Levy). In her article, Harmon states that Mr. Cobb was "[t]old that a white executive at Mr. Levy's company had described him as a 'black James Bond.'" Harmon continues: "Mr. Cobb knew it was meant as a nod to his fondness for gadgets and risk. But 'a 'black' James Bond? he had wanted to know, supplying his own answer: 'Black is the identifier that goes before you, always. It raises the odds that you will get a real reminder that you are an outsider every time they meet you.'" *Id.*

38. Ragins, *supra* note 21, at 49 (citing Goffman, *supra* note 31 (discussing 'courtesy stigmas')); Gregory M. Herek & John P. Capitanio, "Some of My Best Friends": *Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY AND SOC. PSYCH. BULL. 412, 412-24 (1996); see also Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 UMKC L. REV. 643, 658 (2005) (detailing the plight of a heterosexual man who was sexually harassed at work because he associated with gay men); Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006). For other examples of negative association with an openly gay or lesbian person, see for example Lee Romney, *Teen's Attack Investigated*, L.A. TIMES, ORANGE COUNTY EDITION, June 13, 1996, at B1 (discussing the harassment of a heterosexual student athlete because the student's coach disclosed his sexuality). Some people take great pains to avoid even the implication of association with lesbians or gay men. *E.g.*, *Fear of Gay Symbol Changed School Logo*, S.F. EXAMINER, July 28, 2000, at A9 (noting that University of Hawaii changed its seventy-seven-year-old rainbow symbol and team name, "Rainbow Warriors," to avoid gay implications and stigma); see generally Noah Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 102-05, 125-26 (2002).

perceived as gay or lesbian.<sup>39</sup> Even people assumed to be heterosexual may receive negative workplace attention based on association with gay people.<sup>40</sup>

All these issues complicate research on the treatment of lesbians and gay men. Observability of sexual orientation is tougher because openness and identity can change over time and with location and context. Therefore, traditional statistical sampling techniques, such as random sampling, are harder to achieve.<sup>41</sup> Moreover, as each of the empirical studies on lesbians and gay men's treatment and courts experiences demonstrates, visibility and openness affect those experiences in multiple ways. Accordingly, besides examining the different situations in which lesbians and gay men interact with the

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39. See, e.g., JUDICIAL COUNCIL OF CALIFORNIA, SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS, FINAL REPORT OF THE SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL'S ACCESS AND FAIRNESS ADVISORY COMMITTEE 37 (2001) [hereinafter CA REPORT] (approximately 2 percent of court employees did not take action because they might be thought to be gay or lesbian); BROWER, 2003 UK REPORT, *infra* note 47, at 39 (9.1 percent did not act out of concern that they would be thought to be gay or lesbian). This can be distinguished from lesbian or gay court users or court employees who do not intervene or complain after negative treatment due to fear of discovery. See, e.g., NJ REPORT, *infra* note 45, at 48-49.

40. See, e.g., BROWER, 2003 UK REPORT, *infra* note 47, at 59-60 (open-ended comments, Q10 ("I joined the Rainbow Network on the pretext of being a 'friend' whereas I am a full member but not 'out.' I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable & I was able to see people's reaction as if it was assumed I was totally straight & why was I joining supporting this bunch of 'weirdos'")).

41. See Badgett, *supra* note 3, at 35. Professor Badgett compares studying race and gender with sexual orientation. *Id.* at 34-35. As she notes that, "[i]n a functional sense, the 'observability' of these characteristics refers to an observer's ability to infer the characteristics of race, ethnicity, and gender and an individual's willingness to reveal those characteristics consistently." *Id.* at 49 n.3. See also James M. Croteau, *Research on the Work Experiences of Lesbian, Gay and Bisexual People: An Integrative Review of Methodology and Findings*, 48 J. OF VOCATIONAL BEHAVIOR 195, 201-03 (1996); M. OMI & H. WINANT, RACIAL FORMATION IN THE UNITED STATES (1986) (arguing that observability of race is more doubtful than usually recognized). Nor is sex always immediately apparent. E.g., BOYS DON'T CRY (Twentieth Century Fox 1999); THE CRYING GAME (Miramax Films 1992); *Gender-Bending Played to the Hilt: Joan Smith Tells the Strange Story of Jazz Pianist Billy Tipton*, FINANCIAL TIMES, Jan. 23, 1999, at 6; Kim A. Lawton, *Joan of Arc: An Unlikely Popular Icon Today*, PLAIN DEALER (Cleveland, OH), May 15, 1999, at F4 (telling the story of Joan of Arc); Deb Price, *Transgendered Have Lessons for Society*, DETROIT NEWS, June 26, 2000, at A9 (telling the real-life story of Teena Brandon/Brandon Teena, on which BOYS DON'T CRY was based).

courts, it is important to measure, review and disaggregate data by degrees of visibility.<sup>42</sup>

## II. The Empirical Studies

### A. Survey Methodology and Demographics

There are only four empirical studies of LGBT individuals and the courts.<sup>43</sup> The first, *Sexual Orientation Fairness in the California Courts*, appeared in 2001 and found significant examples of unequal treatment of lesbians and gay men in the California state courts.<sup>44</sup> Contemporaneously, the New Jersey Supreme Court Task Force on Sexual Orientation Issues issued its *Final Report*<sup>45</sup> and recounted similar findings. In the United Kingdom, the Department for Constitutional Affairs<sup>46</sup> commis-

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42. See generally Ragins, *supra* note 21, at 55. Both UK studies and the California Report specifically asked about openness in the courts. See BROWER, 2003 UK REPORT, *infra* note 47; see also BROWER, 2005 UK REPORT, *infra* note 47; CA REPORT, *supra* note 39. Unfortunately, the New Jersey Report did not report any data on that question. In one non-court employment study, data showed that race and gender were unrelated to sexual orientation bias and that lesbians and gay men disclosed at equal rates. However, gay employees of color were less likely to disclose at work. Ragins, *supra* note 21, at 59-68. That same study also reported that seeing sexual orientation as a choice was a predictor of anti-gay attitudes. *Id.* at 49 (citing G.M. Herek & J.P. Capitanio, *Black Heterosexuals' Attitudes Toward Lesbians and Gay Men in the United States*, 32 J. OF SEX RESEARCH 95 (1995)); accord Karen Kaplan, *Study Links Male Gays, Birth of Older Brothers*, LOS ANGELES TIMES, June 27, 2006, at A1. Ragins suggested that sexual orientation is viewed differently from race and gender because it is seen as a chosen "lifestyle." Ragins, *supra* note 21, at 49.

43. See, e.g., NATIONAL CENTER FOR STATE COURTS, RACIAL FAIRNESS, TASK FORCE, COMMISSION, AND COMMITTEE REPORTS, <http://www.ncsconline.org/WC/Publications/StateLinks/RacFaiStateLinks.htm> (follow "State" link) (last visited Nov. 8, 2006); NATIONAL CENTER FOR STATE COURTS, GENDER FAIRNESS, TASK FORCE, COMMISSION, AND COMMITTEE REPORTS, <http://www.ncsconline.org/WC/Publications/StateLinks/GenFaiTaskForceStateLinks.htm> (follow "State" link) (last visited Nov. 8, 2006). In contrast, there are studies on racial and ethnic minorities' perceptions of the courts, and gender fairness studies. See generally DAVID B. ROTHMAN & RANDALL M. HANSOM, *HOW RECENT COURT USERS VIEW THE COURTS: PERCEPTIONS OF WHITES, AFRICAN-AMERICANS, AND LATINOS* (National Institute of Justice 2001).

44. CA REPORT, *supra* note 39.

45. NEW JERSEY SUPREME COURT, FINAL REPORT OF THE TASK FORCE ON SEXUAL ORIENTATION ISSUES, (January 2, 2001) [hereinafter NJ REPORT].

46. The Department for Constitutional Affairs (DCA) is the current name for this body; during the 2003 survey it was called the Lord Chancellor's Department (LCD). Accordingly, the 2003 survey and respondents used the terms, Lord Chancellor's Department and LCD. For simplicity, the article uses the older, then

sioned studies and reports in 2003 and 2005 on sexual orientation minorities in the English and Welsh courts.<sup>47</sup>

Ten American state or local bar associations<sup>48</sup> and two

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proper, terms when speaking in historical terms about the body studied in the 2003 report and survey, and uses the DCA when speaking of the modern entity and the 2005 survey and report. The DCA encompasses the DCA Head Quarters and Associated Offices, the Court Services and the Public Guardianship Office. See The Department for Constitutional Affairs, [www.dca.gov.uk/links/dca.htm](http://www.dca.gov.uk/links/dca.htm) (last visited Jan. 27, 2007).

The Court Service is responsible for court operations in England and Wales. AUTUMN PERFORMANCE REPORT 203 (The Lord Chancellor's Dep't N. Ireland Ct. Service 2002-2003). Scotland and Northern Ireland have separate managing bodies. For Scotland's managing body see, <http://www.scotcourts.gov.uk/html/introduction.asp> (last visited Jan. 27, 2007). See also The Judicial Committee (Devolution Issues) Rules Order, 1999, SI 1999/No. 665 (N. Ir.). The Northern Ireland Court Service was established by the Judicature (N.I.) Act of 1978.

For the English and Welsh courts, the Lord Chancellor's Department, Court Service Staff Opinion Surveys in 2000, 2001 and 2002 asked staff general diversity questions. See, e.g., Todd Brower, *Pride and Prejudice: Results of an Empirical Study of Sexual Orientation Fairness in the Courts of England and Wales*, 13 BUFF. WOMEN'S L.J. 17 (2006) (for discussion of these LCD and DCA general employee surveys). These survey questions and results were too generalized in their approach and unspecific in the types of information they sought.

47. TODD BROWER, REPORT ON THE SURVEY OF THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, RAINBOW NETWORK: SEXUAL ORIENTATION FAIRNESS IN THE COURTS OF ENGLAND AND WALES, THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (UK) (2003) [hereinafter BROWER, 2003 UK REPORT]; TODD BROWER, REPORT ON THE 2005 SURVEY OF THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, RAINBOW NETWORK: SEXUAL ORIENTATION FAIRNESS IN THE COURTS OF ENGLAND AND WALES (2005) [hereinafter BROWER, 2005 UK REPORT]. See also Brower, *supra* note 46.

48. BAR ASSOCIATION OF SAN FRANCISCO, MANUAL OF MODEL POLICIES AND PROGRAMS TO ACHIEVE EQUALITY OF OPPORTUNITY IN THE LEGAL PROFESSION, (1994); LA BAR REPORT, *supra* note 10; KING COUNTY BAR ASS'N, IN PURSUIT OF EQUALITY: THE FINAL REPORT OF THE KCBA TASK FORCE ON LESBIAN AND GAY ISSUES IN THE LEGAL PROFESSION (Washington, King County Bar Ass'n. 1995); BAR ASSOCIATION OF THE CITY OF NEW YORK, COMMITTEE ON LESBIANS AND GAY MEN IN THE LEGAL PROFESSION, BAR ASSOCIATION OF THE CITY OF NEW YORK REPORT ON THE EXPERIENCE OF LESBIANS AND GAY MEN IN THE LEGAL PROFESSION (1993); LESBIAN AND GAY LAW ASSOCIATION OF GREATER NEW YORK, LeGAL REPORT ON SEXUAL ORIENTATION FAIRNESS IN SECOND CIRCUIT COURTS (New York Legal 1997); D.C. BAR, SEXUAL ORIENTATION TASK FORCE REPORT (1997), available at [http://www.dcbar.org/inside\\_the\\_bar/structure/reports/task\\_force/](http://www.dcbar.org/inside_the_bar/structure/reports/task_force/) (last visited Feb. 14, 2007); HENNEPIN COUNTY BAR ASSOCIATION LESBIAN AND GAY ISSUES SUBCOMMITTEE, LEGAL EMPLOYERS' BARRIERS TO ADVANCEMENT AND TO ECONOMIC EQUALITY BASED ON SEXUAL ORIENTATION (Minneapolis, Mn. 1995) [hereinafter HENNEPIN COUNTY REPORT]; MASS. GAY AND LESBIAN BAR ASS'N., THE PREVALENCE OF SEXUAL ORIENTATION DISCRIMINATION IN THE LEGAL PROFESSION IN MASSACHUSETTS (1994); COMM. ON SEXUAL ORIENTATION DISCRIMINATION, STATE BAR OF CALIFORNIA, REPORT AND RECOMMENDATIONS REGARDING SEXUAL ORIENTATION DISCRIMINATION IN THE CALIFORNIA LEGAL PROFESSION (1996); STATE BAR OF ARIZONA GAY AND LESBIAN TASK

Canadian bars<sup>49</sup> have studied the treatment and experiences of lawyers in those jurisdictions. In Great Britain, both the Law Society (solicitors) and the Bar Council (barristers) have enacted protections against sexual orientation discrimination in their membership.<sup>50</sup> Nevertheless, neither organization surveyed its members to explore the extent of the problem in those

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FORCE, REPORT TO THE BOARD OF GOVERNORS (Apr. 1999) [hereinafter AZ REPORT]. See also Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias By the Legal Profession*, 8 UCLA WOMEN'S L.J. 343 (1998); William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA WOMEN'S L.J. 379 (1998).

The Arizona Report findings typify the bar association reports. Lesbians and gay men are substantially disadvantaged as employees or participants in the justice system because of sexual orientation bias. AZ REPORT, *supra* note 48, at 18. Forty-seven percent of the judges and lawyers surveyed heard disparaging remarks about lesbians or gay men in courthouse public areas, and thirteen percent observed judges in open court treating negatively those perceived to be lesbians or gay men. *Id.* at 18, 20. Further, some court personnel and court participants preferred not to work with lesbian or gay lawyers. *Id.* at 20 (8% of court personnel and 4% of litigants, jurors, and witnesses indicated such a preference). The community-based survey also showed that the more contact lesbians or gay men had with the Arizona justice system, the more likely they were to witness discrimination or experience a hostile environment based on sexual orientation. *Id.* at 27-28. We must cautiously evaluate that statement, however. First, the Arizona Report broadly defined "justice system" to include attorneys, police, probation and parole officers, as well as other contacts with those persons not limited to the court or judicial context. *Id.* at Appendix (Gay Community Survey, at 1-2, Questions 7-16). Second, the more contact an individual had with the justice system, the more opportunity he or she has to observe negative treatment based on sexual orientation. *Id.* at 22-23. The study did not attempt to control for the number of contacts an individual might have had with that system. Finally, many reported incidents of police harassment, seemingly unrelated to respondents' court experiences. See, e.g., *id.* at 23-24 (respondents' comments).

49. MERRILL COOPER ET AL., FINAL REPORT ON EQUITY AND DIVERSITY IN ALBERTA'S LEGAL PROFESSION (Alberta Law Found. 2004); LE BARREAU DU HAUT-CANADA, IDENTITÉ ET ORIENTATION SEXUELLES: CRÉATION D'UN MILIEU DE TRAVAIL DIVERSIFIÉ. POLITIQUE MODÈLE POUR LES CABINETS ET AUTRES ORGANISMES (Toronto, May 2004).

50. CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES ¶ 204, 305.1 (2006); SOLICITORS ANTI-DISCRIMINATION CODE 7.02 (Law Society 2006); LAW SOCIETY CODE FOR ADVOCACY 2.4 (Law Society) (amended Jan. 13, 2003) (Solicitors Advocates, Registered European Lawyers, and Bodies Corporate recognized as litigators). Accord James Mills, *Barrister who refused to represent gay client reprimanded*, DAILY MAIL (UK), July 26, 2006 (discussing Bar Council's reprimand of Christian barrister who refused to represent gay client based on sexual orientation).



organizations or in the courts, either before or after the enactment of the non-discrimination provisions.<sup>51</sup>

As the California, New Jersey and United Kingdom courts recognized, judicial departments serving multicultural societies include significant communities of sexual orientation minorities.<sup>52</sup> Accordingly, one of the first priorities of each study was

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51. Interview with Martin Bowley, QC (Queen's Council), Chair of the Bar Lesbian & Gay Group, Vice Chairman of the Bar Council (UK), Equality and Diversity Committee (Sex, Sexual Orientation, and Age), in London, UK (Dec. 12, 2002); Interview with Pamela Bhalla, The Bar Council (UK), Equality and Diversity Advisor, Secretary of the Bar Council (UK), Equality and Diversity Committee (Sex, Sexual Orientation, and Age), in London, UK (Nov. 21, 2002); Henry Hodge, *Equal and Decent Treatment*, 145 NEW L.J. 303 (1995) (discussing the history of the Law Society's adoption of its sexual orientation discrimination rules); *Law Society Wrong to Exclude Gays, Says Hodge*, 143 NEW L.J. 79 (1993) (discussing the history of the Law Society's adoption of its sexual orientation discrimination provisions).

In the United States and Great Britain, some non-legal professions have queried their members on sexual orientation fairness. For example, the UK Association of University Teachers' study revealed that LGB academics perceived high levels of discrimination and harassment, and reported salary gaps and glass ceilings in academe. LESBIAN, GAY AND BISEXUAL PARTICIPATION IN UK UNIVERSITIES, RESULTS FROM A PILOT STUDY 12 (Ass'n of Univ. Teachers, Nov. 2001) [hereinafter UK UNIVERSITY STUDY]. Additionally, a 2001 article in the *British Medical Journal* reviewed several studies of sexual orientation bias against medical professionals and documented homophobia among doctors and medical schools directors against LGB physicians. B.F. Burke et al., *Well-being of Gay, Lesbian and Bisexual Doctors*, BRITISH MEDICAL JOURNAL, Feb. 17, 2001. LGB doctors experienced verbal harassment from medical colleagues and that many feared job loss if they disclosed their sexual orientation. *Id.* Other studies have found that gay men fear judgmental attitudes or have other reservations about being open about their sexuality with their physicians. See Tania Branigan, *National Roundup: Health: Gay Men Reluctant to Tell GPs*, THE GUARDIAN (London), Aug. 18, 2004, at 10. Stonewall, the British LGB advocacy organization, found that seventeen percent of people in England were prejudiced against lesbians and gay men and thirty-five percent said that they knew other people who were prejudiced. See STONEWALL, PROFILES OF PREJUDICE 18, 21 (2003). Additionally, persons with negative beliefs about LGB persons were also likely to hold racist attitudes. *Id.* at 12.

The American legal and social science literature on the workplace treatment of LGBT persons is vast. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structured Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1992); M.V. Lee Badgett, *Wage Effects*, 48 INDUS. & LAB. REL. REV. 726 (1995); Croteau, *supra* note 41; Ragins & Cornwell, *supra* note 20.

52. See, e.g., *Equality and Diversity Statement*, COURT SERVICE EMPLOYEE HANDBOOK (UK 2002); EQUALITY AND DIVERSITY ANNUAL REPORT 2001-2002, at 2

to determine the extent, if any, of actual or perceived sexual orientation bias in those courts.<sup>53</sup> Each court surveyed staff regardless of sexual orientation, specifically focusing on sexual minority employees.<sup>54</sup> California and New Jersey also collected the experiences of lesbian and gay court users.<sup>55</sup>

Surveys focused on all aspects of the court system and emphasized respondents' direct experiences, observations and perceptions.<sup>56</sup> Both the California and UK surveys asked people to report on their experiences and observations in the year preceding the survey, and more generally on their experiences and perceptions during their use of or employment with the courts; the New Jersey instrument used a five-year time period.<sup>57</sup> The California and New Jersey questionnaires occurred in 2000; the two UK surveys were deployed in 2003 and 2005. The California and UK surveys requested information on both positive and negative experiences and observations in order not to skew responses towards the negative.<sup>58</sup> All surveys were anonymous,<sup>59</sup>

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(Lord Chancellor's Dep't 2002) (policy statement); CA REPORT, *supra* note 39, at 11; see generally NJ REPORT, *supra* note 45, at 5 ("By forming the Task Force [on Gay and Lesbian Issues], the Court intended to signal 'its strong commitment to the equal treatment of all individuals seeking justice in our court system'").

Sexual orientation minorities are located in virtually every county of the United States. See GARY GATES & JASON OST, *THE GAY AND LESBIAN ATLAS*, (2004). For official estimates of the numbers of lesbian and gay people in England, Wales, Scotland and Northern Ireland, see FINAL REGULATORY IMPACT ASSESSMENT: CIVIL PARTNERSHIP ACT OF 2004, at 13 (UK Dep't of Trade & Indus. 2004), available at <http://www.dti.gov.uk/files/file23829.pdf>. For information on the distribution of lesbians and gay men across Great Britain and Northern Ireland using 2001 British census data, see United Kingdom: 2001 Census Information on Same Sex Couples, <http://www.gaydemographics.org/UK/index.htm> (last visited Feb. 14, 2007).

53. CA REPORT, *supra* note 39, at 12; NJ REPORT, *supra* note 45, at 1; BROWER, 2003 UK REPORT, *supra* note 47, at 9.

54. BROWER, 2003 UK REPORT, *supra* note 47 at 9, 10; CA REPORT, *supra* note 39, at 12; NJ REPORT, *supra* note 45, at 19.

55. The California court user and court employee surveys were separate instruments containing the same or similar questions. CA REPORT, note 39, at 12. The New Jersey survey instrument was sent to both court users and employees. NJ REPORT, *supra* note 45, at 19.

56. BROWER, 2003 UK REPORT, *supra* note 47, at 5, 14; CA REPORT, note 39, at 12; NJ REPORT, *supra* note 45, at 19.

57. BROWER, 2003 UK REPORT, *supra* note 47, at 14; CA REPORT, *supra* note 39 at 13; NJ REPORT, *supra* note 45, at 85 (survey instrument instructions).

58. BROWER, 2003 UK REPORT, note 47, at 14; Brower, Am. U. L. Rev. at n.51 (author's recollection of survey drafting discussions in 1997 meetings of the Sexual

which was particularly important given the sensitivity of the research subject.

Response rates varied, as did the populations studied. The California study combined a court user survey and a separate, court employee one. 1225 lesbian and gay users of the California courts completed the survey for a total response rate of fifty-eight percent.<sup>60</sup> In contrast, California researchers developed the second survey for court employees of all sexual orientations.<sup>61</sup> It was designed to determine whether employees ob-

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Orientation Subcommittee). *See also* CA REPORT, *supra* note 39, at 17 (definition of "positive comments and actions").

59. BROWER, 2003 UK REPORT, *supra* note 47, at 14; CA REPORT, *supra* note 39, at 12; *accord* NJ REPORT, *supra* note 45, at 85 (survey instructions: "Your responses will remain the property of the Task Force and remain confidential.").

60. CA REPORT, *supra* note 39, at 13. Ninety percent of California court user survey respondents were white men. *Id.* Sixty-nine percent were gay. Sixty-six percent lived in an urban area. *Id.* Eighty-three percent had an undergraduate or graduate degree. *Id.* Forty-eight percent had an income of at least \$60,000 a year. *Id.* Sixty-one percent were selectively open about their sexual orientation, primarily with family, friends, and at work. *Id.* at 15. Most gay or lesbian court users had relatively few contacts with the court system. Seventy percent had only two to three contacts since 1990. *Id.* Those contacts tended to be with a criminal or civil court (73%). Further, nearly twice as many contacts were as a juror or potential juror (60%), than as a participant, either a litigant or attorney (32%). *Id.* California analyzed survey results by demographics (i.e., sex, race, age, income, education, and urbanicity of the court, urban, suburban or rural) and by the nature of the court experience itself (i.e., reason for using the court, type of court, in-court or out of courtroom contact). No significant differences appeared based on demographics, socio-economic level or urbanicity. Major distinctions were a function of the court users' experiences. *Id.*; *see also* BREWER & GRAY, REPORT, *supra* note 28, at 33.

61. It sent questionnaires to about 5,500 of the approximately 17,000 California court employees around the state, including court clerks, reporters, administrators and attorneys. CA REPORT, *supra* note 39, at 13; *see also* BREWER & GRAY, REPORT, *supra* note 60, at 9 (of those, 1,525 responded).

Ninety-three percent of California court employee respondents were white, heterosexual, married women. CA REPORT, *supra* note 39, at 15. Sixty-six percent earned less than \$50,000 a year and had no college degree. Ninety-eight percent were fulltime, permanent court employees. The typical respondent had worked for the courts for 12 years, seven in her current position, and was employed as court clerk, clerical staff or mediator. Most respondents participated in court proceedings at least once a month, with almost 50% participating daily. *Id.* California analyzed court employee responses by sexual orientation, sex, education, urbanicity of court, type of court, type of court appointment, and whether respondents observed court daily or less than daily. BREWER & GRAY, REPORT, *supra* note 60, at 10, 69. Except for sexual orientation, the survey found relatively few differences in responses based on the other characteristics. *Id.* Out of 1525 court employee respondents, 64 identified themselves as lesbians, gay men or bisexuals. *Id.* at 9. Of

served negative behaviors toward gay men or lesbians in open court or other work settings, and whether employees personally experienced discrimination, negative actions, or heard negative comments based on their actual or perceived sexual orientation.<sup>62</sup>

In Great Britain, the DCA questioned all members of the LGBT court employee group, the Rainbow Network. The 2003 survey had a total response rate of 67.4 percent.<sup>63</sup> Seventy survey respondents identified themselves as lesbians, gay males or bisexuals, twenty-five as heterosexual and two as other.<sup>64</sup> The survey was repeated in spring 2005 for the then-current Rainbow Network membership.<sup>65</sup>

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those lesbian or gay court employees, over one-third were totally “out” at work; over one-third were selectively “out” at work; over one quarter were not “out” at work at all. CA REPORT, *supra* note 39, at 15. Court employee survey respondents were considerably less likely to openly identify as lesbian or gay at work as compared to court users, where ninety-three percent were totally out or selectively out in their respective workplaces (although significantly, not in the court setting).

62. CA REPORT, *supra* note 39, at 14.

63. BROWER, 2003 UK REPORT, *supra* note 47, at 15 (144 total membership, 97 responses). The response rate compares favorably with that of the LCD, Court Service employee surveys and also with other surveys of minority employee networks in the DCA. See, e.g., BROWER, SURVEY OF PROUD MEMBERS 2003, *supra* note 25, at 1 (response rate: 63%—racial and ethnic employee network). Full members of the Network are self-identified LGBT individuals; Friends of the Network are interested self-identified heterosexual staff. *Id.*

64. BROWER, 2003 UK REPORT, *supra* note 47, at 15. A majority of 2003 UK survey respondents were Rainbow Network Full Members, white, gay men or lesbians, had earned at least an A-level degree, and often lived with a partner of the same sex. They were employed by the DCA for an average of 11.4 years, and were at their current job for an average of 3.6 years. They worked primarily at DCA Headquarters, and in the South Eastern Circuit (London), although a number of respondents were employed in the other judicial circuits. Of the respondents who replied to the question about sexual orientation visibility at work, nearly half were totally out at work, almost one fifth were selectively out, and less than 10 percent were not out at all. *Id.*

65. BROWER, 2005 UK REPORT, *supra* note 47, at 5-6. Demographic changes in 2005 from the earlier study principally were the increase in LGBT court employees and the larger increase non-LGBT court employee “friends of the Network.” Thus, the percentage of LGBT respondents decreased compared to heterosexuals. Further, the 2005 respondents were more diverse geographically, although London and the South-East of England still dominated; they were also slightly more diverse racially and ethnically. Both the network membership and the number of responses increased, while the response rate declined from 67.4 percent to 45 percent. 55 percent of respondents in the spring 2005 study did not participate in the earlier survey. *Id.*

Although the New Jersey survey was similar in purposes and design, it differed more significantly from either the California or the two British studies. Of the approximately 21,000 questionnaires distributed by various methods, 2594 were returned for a response rate of twelve percent. Nearly seventy percent of respondents who identified their relationship to the New Jersey courts were court employees. The high response rate from court personnel allowed them to report on the courts as a workplace and also to observe the judicial process as it affected LGBT persons.<sup>66</sup> Lawyers and judges comprised nearly one-quarter of New Jersey respondents. Seven percent of respondents who identified their sexual orientation were lesbians, gay men or bisexuals.<sup>67</sup>

### B. *Study Limitations*

All empirical research projects have data limitations.<sup>68</sup> Both the California and the New Jersey court employee studies reached a wide cross-section of judicial system personnel, both gay and non-gay. However, some heterosexual court employees objected strongly to being asked about sexual orientation bias.<sup>69</sup>

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66. NJ REPORT, *supra* note 45, at 19. Of the 2594 respondents, 1782 identified as heterosexual, 118 as lesbian or gay and 17 as bisexual. Thus, sexual orientation minorities comprised 7% of those who identified their sexual orientation. *Id.* at 20. There were 42 lesbians and 12 bisexual women; 74 were gay men and 5 were bisexual men. *Id.* at 21-22. 837 respondents were men; 1575 were women, and 182 did not state. The disproportionate female sample reflects the high response rate from court employees, most of whom are women. *Id.* at 21. 2467 respondents identified their relationship to the courts. 267 were judges (223 male, 32 female, 12 did not state sex. Three male judges identified as gay or bisexual, one female judge was bisexual, 39 did not state their sexual orientation. *Id.* at 20. 351 lawyers responded; 124 were females 14 of whom were lesbian or bisexual. 222 lawyers were men of whom 12 identified as gay or bisexual. *Id.* 1586 respondents stated that they were court employees, 1235 were women, 299 men, 42 were gay, lesbian or bisexual. *Id.* at 21. Finally, there were 19 litigants, 17 of whom were gay, lesbian or bisexual, one witness and 48 individuals who identified as something other than judge, attorney, court employee, litigant or witness, half of whom were gay, lesbian or bisexual. 322 persons did not state their relationship to the courts. *Id.* No information was given about education, income, geographic distribution, marital status, race or ethnicity, or other demographic information. *Id.*

67. *Id.* at 24.

68. For discussions of the limitations of the bar association studies, see Rubenstein, *supra* note 48, at 388-392.

69. The court employee survey generated an unusually high number of negative responses to the survey itself—more than other California Judicial Council

Accordingly, some sampling error may have been introduced into those studies.<sup>70</sup>

Second, the nature of the target group makes research into the treatment and experiences of LGBT individuals more difficult. Those persons constitute a significantly large group in society with a 'hidden identity'; minority sexual orientation is not always immediately apparent from any outward, physical appearance or surname.<sup>71</sup> Many LGBT individuals choose not to expose their sexual orientation publicly.<sup>72</sup>

Both the California court user and UK studies specifically sought to get the experiences of gay men and lesbians who had

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employee surveys. CA REPORT, *supra* note 44, at 14. For example, some responses were:

I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians . . . . I have received your survey on sexual orientation and found it to be degrading and offensive. I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel . . . . I decline to answer your survey as I feel it covers a matter that is not appropriate to talk about in the work place.

CA REPORT, *supra* note 44, at 14. As in California, the New Jersey survey provoked a strong negative reaction primarily from court employees: For example:

[A]t one point in everyone's life, everyone has felt discriminated. Get over it; we have. . . . I feel this is bias against anyone who is not gay. . . . I am insulted at having to answer what I believe to be a survey on an unfounded issue. . . . To spend this much money on a group of people who are denounced in the Bible is pathetic. What is this world coming to? . . . The Bible teaches us that homosexuality is a sin. You cannot ask me to evaluate sin. . . . Based on my religious beliefs, I feel that homosexuality is an aberration and is not an 'alternative lifestyle.' I resent having a 'gay' agenda being pushed on my beliefs. . . . I am offended that the State of New Jersey would waste more money on another Task Force to single out this one issue of discrimination from a list of many. How much of my tax dollars are wasted in the implementation of this project, starting with salary, printing and postage.

NJ REPORT, *supra* note 45, at 59-60.

70. The consequences of this error are ambiguous. On one hand, heterosexual court employees may have refused to participate in the survey; on the other, they may have insisted that their voices be heard.

71. See, e.g., UK UNIVERSITY STUDY, *supra* note 51, at 6, 10-11; Brower, *supra* note 14, at 570 n.26; WARREN J. BLUMENFELD & DIANE RAYMOND, LOOKING AT GAY AND LESBIAN LIFE 86 (1993).

72. See, e.g., UK UNIVERSITY STUDY, *supra* note 51, at 6, 10-11; Brower, *supra* note 14, at 570 n.26.

contact with those judicial systems. Thus, they surveyed members of various court and external LGBT organizations. This sampling technique may have skewed the data. For example, although the Rainbow Network membership is representative of DCA employees (except for sexual orientation), it is a self-selecting group of LGBT persons and their heterosexual colleagues. As such, we cannot know how well their responses correspond to those of a broader employee group. If the similar California court employee studies provide guidance, the larger group of British court employees would have been less conscious of sexual orientation issues or discrimination and more likely to see the courts and the DCA as fair. They would, however, still confirm the presence of biased treatment based on sexual orientation, even if their own personal observations as heterosexuals differed from their non-heterosexual co-workers' experiences.<sup>73</sup>

Third, the self-identified group of UK court employee network members or the court-user members of LGBT organizations in California and New Jersey may under-represent closeted LGBT individuals who may be reluctant to join a gay or lesbian organization.<sup>74</sup> To some degree, those issues are common to all empirical research on LGBT persons, a group that is difficult to identify and sample appropriately. The ability of closeted LGBT persons to associate with the British network as 'Friends' may have ameliorated that issue.<sup>75</sup> The researchers in California and Great Britain made several attempts to encourage closeted individuals to participate. Survey respondents in all studies were anonymous.<sup>76</sup> Moreover, the UK author sent surveys without DCA funds, stationery, or supplies, and respondents returned the completed questionnaires to the author and not the DCA or Rainbow Network members. In California and the UK, members were encouraged to give copies of the survey to persons they personally knew to be LGBT, but who were not

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73. See CA REPORT, *supra* note 39, at 68-72.

74. See, e.g., Rubenstein, *supra* note 48, at 390.

75. At least one closeted LGBT person joined as a "Friend" to hide his sexual orientation. BROWER, 2003 UK REPORT, *supra* note 47, at 59-60.

76. BROWER, 2003 UK REPORT, note 47, at 14; CA REPORT, note 44, at 12; NJ REPORT, *supra* note 45, at 85 (survey instructions: "Your responses will remain the property of the Task Force and will be kept confidential.").

members of the various organizations.<sup>77</sup> Nevertheless, some potential respondents may not have wished to participate, even with these safeguards.

Fourth, the British survey author was an American researching UK employees and workplaces. Although he had been living in London for 18 months at the time the survey was developed, he was not a native member of the culture. Accordingly, a group of British citizens and DCA employees vetted the surveys before dissemination to ensure that language, cultural and workplace references were appropriate to the survey group. Moreover, the researcher presented the preliminary and final data to the Rainbow Network and other members of the UK judicial administration to avoid cross-cultural or workplace-specific misunderstandings in data interpretation. Despite possible cross-cultural difficulties, the data are generally consistent with other DCA studies<sup>78</sup> and surveys of LGBT fairness in the American court system.<sup>79</sup>

Fifth, all surveys specifically asked about personal treatment, experiences and observations as well as perceptions of those events. In the British and California surveys, researchers asked questions about both positive and negative experiences so as not to skew the answers negatively. However, all responses were self-reported; the researchers made no attempt to observe directly employees' daily work lives or court users' experiences.

Finally, each of the three jurisdictions surveyed a different sample of court users and court employees. We cannot necessarily generalize from these narrower or targeted samples to the

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77. Recollections of Todd Brower, the author of the UK studies and co-author of the California report.

78. See COURT SERVICE STAFF SURVEYS 2000-2002 (Lord Chancellor's Dep't 2002); see also 2003 PROUD NETWORK SURVEY PRELIMINARY REPORT (Ethnos Consultancy 2003) (on file with author) (the PROUD Network is the DCA employee group for members of racial and ethnic minorities and those issues).

79. See generally Todd Brower, *Homophobia in the Halls of Justice: Sexual Orientation Bars and its Implications Within the Legal System Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 AM. U.J. GENDER SOC. POL'Y & L. 39 (2003); Todd Brower, *A Stranger to its Laws: Homosexuality, Schemas, and the Lessons and Limits of Reasoning By Analogy*, 38 SANTA CLARA L. REV. 65 (1997); Jennifer Durkin, Symposium, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA WOMEN'S L.J. 343 (1998) (discussing the various bar association studies on sexual orientation bias in the United States legal profession).



larger national court user or court employee population. Nevertheless, these studies describe what happened to these participants.<sup>80</sup> Consequently, exact comparisons between the results are impossible, even though the California and UK surveys asked virtually the same questions.<sup>81</sup> However, survey methodologies and design were sufficiently close to discuss common experiences and treatment patterns across time and location and make references to similarities in the data, even if specific discrimination comparisons would be inappropriate.<sup>82</sup> Those common and divergent patterns are the focus of this article, not the specific data points.

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80. See, e.g., Croteau, *supra* note 41, at 202. The California surveys identified 2100 lesbian and gay court users with the assistance of various national and local LGBT advocacy and service organizations and were sent to all court employees, regardless of sexual orientation. CA REPORT, *supra* note 39, at 12-13. The New Jersey survey was sent to 21,000 persons, including all Superior and Municipal court employees, gay and lesbian organizations, published in the New Jersey Law Journal and New Jersey Lawyer, distributed to various private and public attorney organizations in the state and distributed in courthouses. NJ REPORT, *supra* note 45 at 1, 3. The two UK surveys were sent all DCA employees who were full members or friends of the DCA Rainbow Network. Among those included were court clerks, ushers, administrators, and other professionals. BROWER, 2003 UK REPORT, *supra* note 47, at 14-15.

81. The UK surveys were based on the prior California study with slight modifications to account for linguistic differences between British and American English and judicial terminology. Moreover, although both legal systems share a common Anglo-American model, the two court systems, workplaces and job descriptions diverge somewhat. Recollections of the author, the drafter of both UK surveys and a drafting participant in the California instrument.

82. See M.V. Lee Badgett, *Vulnerability on the Workplace: Evidence of Anti-Gay Discrimination*, ANGLES: THE POL'Y J. FOR GAY AND LESBIAN STRATEGIC STUD. 1, 1-2 (1997) ("Identifying a precise level of discrimination is impossible given [the self-reporting] method, but such consistent findings across time and region reflect gay employees' beliefs that their workplaces are unfair or hostile."); see also Croteau, *supra* note 41, at 202.

Lesbian and gay male court users in California completed a separate survey about their experiences, while in New Jersey all persons received the same questionnaire. In both US jurisdictions and in the UK, court employees were asked about what they witnessed happening to lesbian and gay court users. Because the DCA and the California and New Jersey Administrative Offices of the Courts regulate courts and associated agencies in those localities, court employees observed the treatment of LGBT persons in the legal system.

### III. Sexual Orientation Minorities' Experiences and Treatment in the Courts

#### A. Court Users

Visibility affected the two groups studied, court users and court employees, in slightly different ways. For court users, the dominant pattern is degradation in lesbian and gay court users' experiences when sexual orientation became visible, either as a topic in the court proceeding, or as a characteristic of the court users themselves. Sexual orientation remains salient. Just as a viewer alternates between the two figures in the opening multistable illusion and cannot see only one, visibility and knowledge of minority sexuality cannot be ignored once learned. Although present in the other jurisdictions, this pattern is most obvious in the California study because it specifically inquired about two different court experiences: the most recent California court contact and another, significant contact.

The California survey results for respondents' most recent court contact provide a typical experience or a baseline for lesbian and gay court users' treatment and perceptions of fairness in the California courts.<sup>83</sup> By focusing on the most recent contact, the survey drew on a random sample of lesbian and gay court users' experiences, rather than have them describe a court contact that they deemed negatively or positively noteworthy.<sup>84</sup> Moreover, sexual orientation was overwhelmingly not pertinent to that latest contact<sup>85</sup> and so it was not likely to be unusual in that regard. Finally, sixty percent of lesbian and gay court users' most recent experiences concerned some manner of jury service, rather than as a party, lawyer or witness in the proceedings (44.2 percent).<sup>86</sup>

In contrast, the other, significant court contact predominantly involved sexual orientation issues.<sup>87</sup> Further, lesbian

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83. See BREWER & GRAY, REPORT, *supra* note 28, at 7.

84. *Id.* at 7.

85. At least 81.4 percent of those court contacts did not involve sexual orientation issues. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 21, 8 (question 9 responses).

86. BREWER & GRAY, REPORT, *supra* note 28, at 17 (table 5).

87. Lesbian and gay court users reported that the other contact focused on sexual orientation issues 74.3 percent of the time. Those issues included, adoption, parenting involving lesbian or gay parents, hate crimes, family dissolutions involv-

and gay court users participated more actively in that court contact as a party, witness or lawyer (55.1 percent), as opposed to some form of jury service (22 percent).<sup>88</sup> Survey respondents' agreement with the statement, "[a]s far as I could tell, I was treated the same as everyone else," dropped from 89.2 percent in the most recent contact to 74.5 percent in the noteworthy contact.<sup>89</sup> Similarly, respondents' perception that people treated them respectfully fell from 80.4 percent to 70.4 percent in the recent and significant contact.<sup>90</sup> Because the survey asked identical questions in both contexts, the difference is a function of the nature and duration of these court experiences.<sup>91</sup> Visibility of sexual orientation, either as a topic within the court proceeding or as a characteristic of the court users themselves, significantly affected lesbian and gay court users' treatment and perceptions of fairness.<sup>92</sup>

Individuals with casual court contacts, such as paying a traffic ticket or being called for a jury panel, may understandably have more favorable impressions of the courts<sup>93</sup> than those

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ing lesbian or gay family members, domestic violence, employment discrimination, wills and trusts, and other issues directly related to sexual orientation. *Id.* at 29 (table 14).

88. *Id.* at 28 (table 13). Additionally, the rank order of percentages of lesbian and gay respondents' involvement in the two court contacts is very different. Lesbian and gay court users' active participation ranks significantly higher in the other contact than in the more recent one. *Compare id.* at 17 (table 5), *with id.* at 28 (table 13).

89. *Id.* at 25 (table 10), 37 (table 18).

90. *Id.*

91. *See generally* BREWER & GRAY, REPORT, *supra* note 28, at 8 (making statement in the context of demographic analysis of the data). Alternatively, lesbian and gay court users' experiences may have improved over time. While this explanation initially appears plausible, it ignores the actual timing of respondents' court contacts. The most recent court contact necessarily occurred before the other contact, and both contacts must have taken place between January 1, 1990 and May 1998. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 2-3, 9. However, we cannot generalize about the timing of the court contacts among all court users. Some respondents' most recent experiences might have occurred before another respondent's "other, significant contact," and vice versa. *See generally* BREWER & GRAY, REPORT, *supra* note 28, at 6-7.

92. The high correlation between active participation by lesbian and gay court users or the pertinence of sexual orientation as an issue in a court experience and deterioration in their treatment and perceptions is unlikely to be mere coincidence.

93. For many respondents these contacts were sexual orientation neutral events. *See, e.g.,* BREWER & GRAY, REPORT, *supra* note 28, at 18 ("My most recent contact involved paying a traffic ticket. Everyone was very nice. No one noticed/

with more extended contacts or personal involvement. Those limited contacts often end up being sexual orientation-neutral events,<sup>94</sup> a quality often missing when lesbian and gay court users' became more personally involved.<sup>95</sup> Further, the more limited the court contact, the less likely others learned of respondents' sexual orientation. For example, "I reported for jury duty but the case was settled out of court. I am openly gay but not outwardly gay, so it never came up."<sup>96</sup> Consequently, lesbian or gay identity was not manifest and could not affect treatment.

However, when more lesbian and gay court users participated as an attorney, party, or witness,<sup>97</sup> they also perceived the California courts as less fair.<sup>98</sup> Direct participants in a case

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asked my sexual orientation. It did not and should not come up . . . . My jury service seemed to be a gay-neutral event.").

94. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 6 (responses to question 16) ("My last contact with the courts was to report for jury duty, where I sat for two hours then we were all released. I never spoke to anyone."). In the most recent contact, at least 81.4 percent did not involve sexual orientation issues. *Id.* at 8 (responses to question 19).

95. In the more actively participatory contact, 74.3 percent of those contacts involved sexual orientation issues. BREWER & GRAY, REPORT, *supra* note 60, at 29 (table 14).

96. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 6 (responses to question 16).

97. Compare lesbian and gay court user survey respondents' most recent contact with the California courts, which contact tended to be through jury service (60.1%), with a different, recent contact with the courts, which contact tended to be when they were a party, witness, or lawyer in the proceedings (55.1%, jury service during that contact, 22.2%). BREWER & GRAY, REPORT, *supra* note 28, at 16 (table 5), *compare with, id.* at 28 (table 13).

98. When more lesbian and gay court users participated actively in a court contact, 25.5 percent believed that they were treated differently from everyone else as far as they could tell, whereas 10.8 percent believed they were treated differently in their primarily jury service contact. *Id.* at 37 (table 18), *compare with, id.* at 24 (table 10).

"In a domestic abuse case, the judge did not ask me the same questions she asked potential jurors regarding my relationship with my companion or my experience with domestic abuse." BREWER & GRAY, REPORT, *supra* note 28, at 20. Similarly, in a court contact in which they participated more actively, 29.6 percent of lesbian and gay court users felt those who knew their sexual orientation did not treat them with respect; however in their primarily jury service contact, 19.6 percent of respondents felt that those who knew their sexual orientation treated them disrespectfully. *Id.* at 37 (table 18); *compare id.* at 38 (table 19), *with id.* at 26 (table 11). Finally, when more respondents participated actively in a court contact, 39 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "[m]y sexual orientation was used to devalue my credibility."

reported more negative incidents than did all respondents.<sup>99</sup> Their extended contact and more active roles may have provided others with the opportunity to learn their sexual orientation<sup>100</sup> and increased their negative experiences and perceptions. Once people perceive court users to be lesbian or gay, that trait overshadows other aspects of their identity.

Similarly, when sexual orientation became an issue in the court contact, thirty percent believed those who knew their sexual orientation did not treat them with respect, and thirty-nine percent believed their sexual orientation was used to devalue their credibility.<sup>101</sup> Survey responses illustrate this connection: "Defendant's lawyer . . . used my relationship and my partner as object of focus to denigrate my loss and income claim and create smoke and mirrors. That would not have been used in non-gay situation."<sup>102</sup> "One defendant was a gay man suing an ex-lover – snickers and comments from jury members."<sup>103</sup> "Jury member suggested that witness was gay and therefore his testi-

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*Id.* at 37 (table 10). In contrast, 13.6 percent of them agreed somewhat or very strongly with the statement, "[m]y sexual orientation was used to devalue my credibility," in their primarily jury service contact. *Id.* at 25 (table 10).

99. 14% of direct participants in a case reported ridicule compared to 12% for the entire sample of lesbian or gay respondents; 5.3% reported negative comments about themselves versus 4.2% for the overall sample, and 8% of direct participants reported negative actions compared to 6.4% overall. BREWER & GRAY, REPORT, *supra* note 60, at 17.

100. In that contact, 28.7 percent of lesbian and gay court users reported that someone else disclosed their sexual orientation without respondents' approval, and 24.5 percent felt compelled to state their sexual orientation against their will. BREWER & GRAY, REPORT, *supra* note 60, at 37 (table 18); *see also* BREWER & GRAY, SURVEY DATA, *supra* note 10, at 6 (responses to question 16) ("I reported for jury duty but the case was settled out of court. I am openly gay but not outwardly gay, so it never came up. . . . My last contact with the courts was to report for jury duty, where I sat for two hours then we were all released. I never spoke to anyone.").

101. 74.3 percent of respondents' other recent and significant contact with the courts involved certain sexual orientation issues. BREWER & GRAY, REPORT, *supra* note 28, at 29 (table 14). In that contact, 25.5 percent of lesbian and gay court users believed they were treated differently from everyone else, and 29.6 percent of lesbian and gay respondents felt those who knew their sexual orientation did not treat them with respect. In that same contact, 39 percent of lesbian and gay court users believed that their sexual orientation was used to devalue their credibility. *Id.* at 37 (table 18), 38 (table 19) (mean ratings). Compare the data for these same questions in respondents' most recent contact: 10.8%, 19.6%, and 13.6% respectively. *Id.* at 24 (table 10).

102. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 4.

103. *Id.* at 9.

mony could not be trusted.”<sup>104</sup> “I was discredited as a witness because they said I was probably ‘out at a club or something’ before I witnessed the accident.”<sup>105</sup>

Interestingly, disparaging remarks and negative comments about sexual orientation minorities are sometimes litigation tactics used to win cases.<sup>106</sup> One California study comment illustrated the use of sexuality to resonate with some jurors’ negative perceptions of lesbians and gay men.<sup>107</sup> “[A lawyer] questioned potential jurors about whether they would accept unbiased testimony from gay witnesses. The manner of question implied gays were unreliable witnesses, thus placing a bias in the minds of potential jurors.”<sup>108</sup>

The New Jersey and UK studies contained similar reports. “In one case, a lawyer, his client and several witnesses used the other litigants’ homosexuality to assert [that] both the defendants and [their] witnesses were alcoholic and sexually promiscuous and predatory.”<sup>109</sup> One gay male litigant reported that his former wife’s attorney repeatedly referred to his “alternate lifestyle” as often as possible, regardless of the issue at hand.<sup>110</sup> In a parental visitation matter, an attorney “impugned my client . . . as unfit solely because of his sexual orientation.” The

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104. *Id.* at 2.

105. *Id.* at 12.

106. For other tactical uses of sexual orientation, see for example NJ REPORT, *supra* note 45, at 41-42; BROWER, 2005 UK REPORT, *supra* note 47 at 36.

107. See juror studies, *infra* note 129.

108. BREWER & GRAY, REPORT, *supra* note 28, at 31 (“I was a jury prospect but it was evident that the defense lawyer didn’t want gays on the jury. One of his questions to me during selection was Mr. X, would you say you have more straight friends or gay friends? I was discharged.”). Section 231.5 of the California Civil Procedure Code adds sexual orientation as a prohibited category for exclusion during peremptory challenges during jury selection and section 204(a) does the same as a jury service exemption. Although this law gives lesbians or gay men protections unavailable at the time of the survey, the survey data also reflect that legal doctrine and actual treatment of lesbians or gay men often diverge. Accord Ragins & Cornwell, *supra* note 20, at 1252 (discussing disclosure as a function of gay-protective legislation, gay-supportive workplace policies and other factors). Moreover, at least one study has shown that even where gay men have anti-discrimination protections, male couples earn less and are less likely to be employed than their heterosexual counterparts. Angela Balakrishnan Elizabeth Bauer, *Gay Men Earn Less and are More Likely to be Jobless, Survey Shows*, THE GUARDIAN (UK), July 28, 2006, at F25 (discussing the Centre for Economic Performance, London School of Economics study).

109. NJ REPORT, *supra* note 45, at 41.

110. *Id.* at 42.

person reporting this incident noted that the court “rejected those remarks;” however, it limited the father’s visitation “for other reasons.”<sup>111</sup> British respondents stated that it is “[u]sual in Family Proceedings to put down to sexuality inability to care for children.”<sup>112</sup> “In a court case between two gay women seeking custody of a child - the words ‘it’s not normal’ ‘You know what they are, don’t you’ were frequently used.” “This was always used in order to ‘fight’ for their client, especially where children were concerned.”<sup>113</sup>

Gay persons’ more active court participation and/or increased sexual orientation visibility in the proceedings also corresponded to an increased perception of threat. Despite the relative neutrality of their most recent court contact, over one fifth of all lesbian and gay court users felt threatened based on their sexual orientation.<sup>114</sup> However, the percentage of respondents who felt threatened nearly doubled once sexual orientation became more significant or more of them participated actively in the court contact.<sup>115</sup> “I felt intimidated – didn’t want them [two clerks and a police officer observed by Respondent while in line] to talk about me the way they were talking about other gays – kept my mouth shut.”<sup>116</sup> “Death threats and name calling. Not of me but of the lesbians directly involved in the case.”<sup>117</sup>

If minority sexual orientation remains salient and overshadows other aspects of the court users’ identity, sexual orientation should color even those proceedings in which it would otherwise not appear. The California report corroborates this hypothesis. Lesbian and gay court users reported that their sexual orientation was raised as an issue almost as often when

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111. *Id.*

112. BROWER, 2003 UK REPORT, *supra* note 47, at 55 (open-ended comments, Q3).

113. *Id.* at 56 (open-ended comments, Q10).

114. In their most recent contact with the California courts, 21.5 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” BREWER & GRAY, REPORT, *supra* note 28, at 24 (table 10).

115. 37.7 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” *Id.* at 37 (table 18).

116. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 12.

117. *Id.* at 12.

it did not pertain to the proceedings as when it played a relevant role in their case or in their reason for using the courts.<sup>118</sup> In a similar anecdote, one New Jersey gay litigant stated that his ex-wife's attorney frequently referred to his "alternate lifestyle", without regard to its pertinence to the issues.<sup>119</sup> Lesbian and gay identity, once known, appears to shade all other aspects of the court experience, even when it is irrelevant.<sup>120</sup>

California gay and lesbian court users' demographic profile reinforces this inference. Those respondents were predominantly educated, relatively affluent, white males.<sup>121</sup> Consequently, they should have the most sophistication and ability to navigate through the judicial system, and have the most positive experiences and perceptions of the courts.<sup>122</sup> However, even relatively privileged court users have more negative experiences and unfairness when they become visible as non-heterosexual.

Readers familiar with sexual orientation bias in modern American society should find this connection neither unex-

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118. In their most recent contact, 15.3 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "[m]y sexual orientation was pertinent to the court proceedings," and 11.2 percent those same respondents agreed somewhat or very strongly with the statement, "[m]y sexual orientation was raised as an issue even though it did not pertain to the case." BREWER & GRAY, REPORT, *supra* note 28, at 24 (table 10). In another, recent, significant contact with the courts, 38.2 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "[m]y sexual orientation was pertinent to the court proceedings." 35 percent of those same respondents agreed somewhat or very strongly with the statement, "[m]y sexual orientation was raised as an issue even though it did not pertain to the case." *Id.* at 37 (table 18).

119. NJ REPORT, *supra* note 45, at 42.

120. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting); LA BAR REPORT, *supra* note 10, at 32; Louis Sahagun, *California and the West: Lesbian Coach Sues Utah School in Court: Woman Says She Lost Volleyball Team Post and Was Warned Not to Discuss Her Sexual Orientation On or Off Campus*, L.A. TIMES, Oct. 22, 1997, at A3 (once lesbian teacher told student she was gay, her school principal removed her as coach because "his perception of [her] had changed" after eight years).

121. BREWER & GRAY, REPORT, *supra* note 28, at 11-12; CA REPORT, *supra* note 39, at 15.

122. See, e.g., DAVID B. ROTTMAN & RANDALL M. HANSEN, HOW RECENT COURT USERS VIEW THE STATE COURTS: PERCEPTIONS OF WHITES, AFRICAN-AMERICANS, AND LATINOS 2 (2001), available at [http://www.flcourts.org/gen\\_public/family/diversity/bin/perceptions2.pdf](http://www.flcourts.org/gen_public/family/diversity/bin/perceptions2.pdf) ([a]frican-Americans with recent court experience report significantly less fairness than do Whites and Latinos. In turn, Latino litigants generally perceive less fairness than do Whites).



pected nor aberrant. Some have called anti-gay animus the last socially acceptable form of prejudice existing today.<sup>123</sup> Indeed, fearing negative consequences from disclosing minority sexuality is one reason many persons remain hidden. As one California court user commented, "many homosexuals, unless self-identified as homosexuals, are assumed to be heterosexuals . . . . Why do I prefer to pass as heterosexual? To avoid mistreatment."<sup>124</sup> Similarly, the Arizona Bar Report found that judges and lawyers reported some court participants and personnel preferred not to work with openly gay or lesbian attorneys.<sup>125</sup> A significant number of gay and non-gay lawyers in Los Angeles County believed that disclosing sexual orientation would be harmful to an attorney's career.<sup>126</sup> Indeed, nearly one half of all Los Angeles lawyers surveyed, regardless of sexual orientation or sex, believed that simply discussing one's personal or family life in a manner that revealed the sex of one's partner—an inconsequential matter for a non-gay lawyer—would harm a gay attorney's livelihood.<sup>127</sup>

Sixty-one percent of the New Jersey litigants and six percent of lawyers said that they had avoided or been advised to avoid using the judicial system because of their or their clients sexual orientation. Virtually all of the litigants so reporting were lesbian or gay; thirty-six percent of the gay or lesbian lawyers answered affirmatively, while only four percent of the non-gay attorneys did so.<sup>128</sup>

Annual nationwide juror polls routinely find that jurors report they are three times less likely to be fair to gay litigants than to African-Americans, Asians, Hispanics or Whites.<sup>129</sup>

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123. See, e.g., E.A. Harvey, *The Last 'Acceptable' Prejudice; in an Increasingly Tolerant World, Gay Teens Still Face Harassment And Social Isolation. Two Who Survived High School Remember*, SUNDAY NEWS (Lancaster, Pa.), May 21, 2000, at G1; Richard Williamson, *Gay Exec Talks About 'Glass Ceiling'*, THE ROCKY MOUNTAIN NEWS (Denver, Co.), Nov. 11, 1999, at 4B.

124. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 8 (responses to Question 19).

125. AZ BAR REPORT, *supra* note 48, at 20.

126. LA BAR REPORT, *supra* note 10, at 29-31.

127. *Id.* at 31.

128. NJ REPORT, *supra* note 45, at 28 (question 4).

129. Peter Aronson, David Rovella & Bob Van Voris, *Jurors: A Biased Lot*, THE NAT'L L.J., Nov. 2, 1998, at A1 (reporting results of annual National Law Journal-Decision Quest 1998 Juror Outlook Survey); Ben Schmitt, *Poll: Jurors*

Only eight percent of all New Jersey respondents reported experiencing or observing litigants or witnesses treated disadvantageously because they were or were perceived to be gay or lesbian, but forty-five percent of lesbian or gay respondents in that state reported that experience.<sup>130</sup> Similar figures exist for lawyers being treated disadvantageously based on their actual or perceived minority sexual orientation<sup>131</sup> or that of their clients.<sup>132</sup>

As in California and the UK, significantly more New Jersey lesbian and gay respondents reported observing or experiencing negative behaviors than did their non-gay counterparts. Sixty-one percent of the lesbian or gay respondents, but only ten percent of all New Jersey respondents with litigation experience, believed that sexual orientation bias affected the outcome of a

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*Would Buck Laws to Achieve Justice*, DAILY REPORT (Fulton County, Ga.), Nov. 16, 1998 (reporting results of 1998 National Law Journal-Decision Quest 1998 Juror Outlook Survey: less than 5% of respondents said they could not be fair to a Black or Hispanic litigant, 17% could not be fair to a lesbian or gay litigant); Bob Van Voris, *Voir Dire Tip: Pick Former Juror*, THE NAT'L L.J., Nov. 1, 1999, at A1 (1999 Juror Outlook Survey results: 3% of respondents said could not be fair if a litigant were Black, Asian, American Indian or White, 4% for Hispanic litigants, 12% if the party were a lesbian or gay man). The 1999 data show that among respondents over the age of 65, 20.4 percent stated they could not be fair to a lesbian or gay litigant. *Id.* Accord Rachel Vincent, *I overheard a juror saying his idea of a drug dealer was a big black bloke*, THE GUARDIAN (London), Oct. 28, 2003 (discussing racial bias by jurors); Candida Lloyd, *"Is that a writ in your pocket?"*, THE INDEPENDENT (UK), Feb. 3, 2004. However, most traditional British legal doctrine has prevented examination of juror attitudes by empirical means. *Id.*; see also *R. v. Mizra (The House of Lords)*, THE TIMES (LONDON), Jan. 23 2004; See generally Peter Herbert, *Racism, Impartiality and Juries*, 146 NEW L.J. 1138 (1995).

130. NJ REPORT, *supra* note 45, at 25-26 (question 1). Of those reporting such an incident, 30.2% said that a judge took those actions, 34.1% said a lawyer did so, 60% answered other court personnel, and 40% other (answers do not sum to 100% since respondents may have reported that more than one person acted in this way). *Id.* at 25.

131. *Id.* at 26-27 (question 2) (3% of all respondents answered yes compared to 23% of lesbian or gay respondents. Of those reporting such an incident, 44.9% said that a judge took those actions, 55.1% said a lawyer did so, 62.8% answered other court personnel, and 25.6% other).

132. *Id.* at 26-27 (question 3) (3% of all respondents answered yes compared to 28% of lesbian or gay respondents. Of those reporting such an incident, 49.3% said that a judge took those actions, 47.4% said a lawyer did so, 60.8% answered other court personnel, and 26.6% other).

case in which they were involved or which they observed.<sup>133</sup> Compared to all Garden State respondents, sexual minorities reported many more incidents in which gay litigants or clients of gay lawyers fared worse in the family or criminal courts.<sup>134</sup>

New Jersey respondents described two incidents where a judge's sexual orientation bias was cause for recusal. A lesbian couple's custody matter was transferred to another judge because of demeaning remarks on and off the bench.<sup>135</sup> Another respondent indicated that some bench officers who acknowledged being biased against gay or lesbian litigants had cases reassigned to other judges where sexual orientation matters were involved.<sup>136</sup> In addition, a person familiar with family court said that a judge had joked in chambers that a child who was the subject of a custody dispute "would 'skip to school' if custody was awarded to the gay father."<sup>137</sup> Another gay father in family court reported that "the judge wanted to force me to take an HIV test [as] requested by my [ex] wife's attorney."<sup>138</sup>

Criminal cases reflected analogous bias. "[Courts] don't take crimes against homosexuals/lesbian people as seriously. It appears that the perpetrators of crimes against gays are given lighter sentences."<sup>139</sup> A clinical social worker noted that "sentencing patterns are clearly stricter [for homosexual sex offenders] than [for] heterosexual sex offenders."<sup>140</sup> That same person remarked that clients who had been physically assaulted in bias attacks were "threaten[ed], cajole[d] and pressure[d] by lawyers] not to file complaints."<sup>141</sup>

California lesbian and gay court users' treatment is consonant with the New Jersey experiences. Overall, fifty-six percent of gay and lesbian court users in a contact where sexual orientation became significant, reported observing or experienc-

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133. *Id.* at 35 (question 7) (all respondents: 148 yes, 1,384 No, 951 No Experience. Gay/Lesbian respondents: 55 yes, 35 no, 39 no experience. Gay/Lesbian Lawyers: 21 out of 35 (60%) reported this experience).

134. *Id.* at 36-37 (question 9 – family law); *id.* at 37-38 (question 10 – criminal law); *id.* at 39-40 (question 11).

135. *Id.* at 40

136. *Id.* at 41.

137. *Id.* at 40.

138. *Id.*

139. *Id.* at 40.

140. *Id.* at 41.

141. *Id.* at 40.

ing a range of negative experiences directed toward themselves or other gays and lesbians.<sup>142</sup> Specifically, thirty-six percent heard negative comments about someone else, and twenty-three percent heard negative comments about themselves.<sup>143</sup> Twenty-nine percent heard negative remarks arising from a case; twenty-six percent experienced or heard ridicule, snickering, or jokes about lesbians and/or gay men, and twenty-five percent heard other negative remarks.<sup>144</sup> In fact, one "[j]ury member suggested that witness was gay and therefore his testimony could not be trusted."<sup>145</sup> "Two attorneys were in the hall outside of the courtroom talking. One said, 'did you see that?' This was followed by a joke, then laughing. Bailiff joined attorneys briefly – all laughed."<sup>146</sup>

The most direct evidence of the stigmatizing effects in the courts of open lesbian or gay identity appears in the various reports' specific findings on disclosure of sexual orientation and responses to requests for personal information. Because being an open lesbian or gay man involves a continuing series of choices about disclosure, even otherwise open gay people may be reluctant to reveal their sexual orientation in the courts. Fifty-six percent of California sexual minorities did not want to state their sexual orientation during their court contact,<sup>147</sup> although most of these court users were openly gay or lesbian in other contexts.<sup>148</sup> Over ninety percent were totally or selectively open at work, to family, to friends, and within the community.<sup>149</sup> The size of the disparity in visibility between the judicial system and other settings may reflect that lesbian and gay court users' experiences are far from ideal, despite their le-

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142. BREWER & GRAY, REPORT, *supra* note 28, at 30 (table 16).

143. *Id.*

144. *Id.*

145. *Id.* at 18.

146. *Id.*

147. 59.7% of lesbian and gay court users did not want to state their sexual orientation during their most recent contact with the California courts. BREWER & GRAY, REPORT, *supra* note 28, at 24 (table 10). 55.6% of lesbian and gay court users did not want to state their sexual orientation during another significant recent contact with the California courts. *Id.* at 37 (table 18).

148. *Id.* at 24.

149. 92.8% at work, 94.6% to family, 99.4% to friends, 91.5% within their community. *Id.* at 13 (table 2).

gal protections in the courts.<sup>150</sup> "One man in particular made gestures and anti-gay comments. Others would nod in agreement[;] it was very scary to come out in that environment. The judge did dismiss this man after a while."<sup>151</sup> Another court user noted that an attorney, witness, and court audience member stated that a gay man "asked for it" by being out.<sup>152</sup> At least one court user respondent specifically reported that he or she passed as heterosexual rather than be subjected to mistreatment as gay or lesbian.<sup>153</sup>

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150. All the jurisdictions studied have legal protections against sexual orientation discrimination in the court and in workplaces. However, as Professor Ragins and others have shown, legal protections against discrimination are not the most significant factor determining whether lesbians and gay men disclose their sexuality in the workplace. Ragins & Cornwell, *supra* note 20, at 1254.

151. BREWER & GRAY, REPORT, *supra* note 28, at 20.

152. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 9. The idea that openly gay people deserve negative treatment is common. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996) (after a mock rape by male students, gay middle school boy fled to his principal's office. Principal's response was "that 'boys will be boys' and told [the complaining student] that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students."); Ed Bradley, *60 Minutes: Don't Ask, Don't Tell: Law Regarding Homosexuals in the Military* (CBS television broadcast Dec. 12, 1999) (discussing the policy and the conviction of a soldier for killing another soldier believed to be gay). Discussing the murder of the gay soldier:

Mr. JAVIER TORRES: Here is someone else, a y—another soldier, in the same position that I am, and he was gay and he got murdered over that fact. When I heard it, inside I was scared, I was shocked. But on the outside I pretended to be, like, 'Cool. No big deal. Just a fag, you know.' And—and that was the part that hurt the most, because here I am gay. I—I mean, obviously I was scared. I was fearful of my own life. BRADLEY: What—what did the—the other guys say after Barry Winchell was murdered? Mr. TORRES: There was some who was, like, 'Hey, it's just one less fag to deal with. I mean, they don't really belong here anyways. You know, I mean, it's their fault for putting themselves in that position. They should know better.'

*Id.*

153. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 8. *Accord*, LA BAR REPORT, *supra* note 48, at 27 ("most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream"); *id.* at 27 n.179 (one lesbian lawyer married in order to make partner); NJ REPORT, *supra* note 45, at 48-49 (lesbian or gay court employees refusing to disclose their sexual orientation).

Passing for non-gay is not always an option, even for those persons who might wish to do so. Some gay men or lesbians show more deviation from societal gender or sexual orientation norms. See, e.g., Carbado & Gulati, *supra* note 31, at 1267-68 n.16 (some people fall between categories, and therefore have more or less work to do to conform or to fit in); see also Badgett, *supra* note 3, at 50 n.5. As one British court employee noted, "[s]ecurity personnel seem to think the visual disparity be-

Further, choosing whether and how to reveal one's sexual orientation is very different from being forced to disclose it or having someone else do so.<sup>154</sup> Given the increased likelihood of negative consequences that attach to visible sexual orientation, losing control over that decision can produce significant anxiety.<sup>155</sup> Thus, it is important that over one in four lesbian or gay California court users believed that someone else disclosed their sexual orientation without their approval in a court contact involving sexual orientation issues.<sup>156</sup> Further, in that same setting, nearly an equal number felt forced to state their sexual orientation against their will.<sup>157</sup>

Despite their unwillingness to disclose this personal information, in the baseline California contact, a few lesbian and gay court users were directly asked about their sexual orientation.<sup>158</sup> Lawyers predominantly asked that question and always in court.<sup>159</sup> However, when the contact involved more active court participation, over one in five lesbian and gay court users

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tween my appearance and my gender identity is a subject of hilarity." BROWER, 2003 UK REPORT, *supra* note 47, at 37 (open-ended comments Q17).

154. Commentators have extensively discussed the controversial practice of "outing"—disclosing the sexual orientation of closeted lesbian or gay politicians or celebrities without their permission, particularly those who have taken anti-gay actions. *See, e.g.*, Mathieu J. Shapiro, Note, *When Is A Conflict Really A Conflict? Outing And The Law*, 36 B.C. L. REV. 587 (1995); Jon E. Grant, Note, *"Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 CORNELL L. REV. 103 (1991); LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* (1993); MICHELANGELO SIGNORILE, *QUEER IN AMERICA* 70-77 (Random House, 2d ed., 1994) (1960).

155. For an extreme example of the stress that forced disclosure causes, see Robert Sallady, *Davis, Lawmakers Fight Over Parole for Model Inmate*, UNION-TRIBUNE (San Diego, Ca.), May 3, 2000, at A3 (discussing parole in the case of Robert Rosenkrantz, who was so distraught over the unconsented disclosure of his homosexuality that he killed the person who revealed the information).

156. 28.7% of lesbian and gay court users reported someone else stated their sexual orientation without their approval. *Compare* BREWER & GRAY, REPORT, *supra* note 28, at 37 (table 18), *with id.* at 24 (table 10) (8.6% during their most recent contact with the California courts).

157. 24.5% of lesbian and gay court users reported they felt compelled to state their sexual orientation against their will. *Compare* BREWER & GRAY, REPORT, *supra* note 28, at 37 (table 18), *with id.* at 24 (table 10) (10.5% during their most recent contact with the California courts).

158. 3% of respondents were asked directly about their sexual orientation. *Id.* at 16 (table 6).

159. *Id.* at 15. *Accord* NJ REPORT, *supra* note 45, at 58 (questions 21-22) (asking judges whether they had been asked to conduct voir dire on sexual orientation attitudes and whether the judge permitted it).

were asked to indicate their sexual orientation.<sup>160</sup> Once again, three-quarters reported that a lawyer asked that question.<sup>161</sup>

The New Jersey survey queried judges whether lawyers sought to question potential jurors about sexual orientation attitudes, and whether judges allowed those inquiries.<sup>162</sup> Although both those questions are important,<sup>163</sup> they assume that sexual orientation only arises in jury selection through specific inquiries; it does not.

Standard voir dire questions on marital status may make minority sexual orientation so invisible during jury service that often courts do not even realize the effects those questions have or how inattentive they are to the diversity of lesbian and gay court users' lives.<sup>164</sup> In their most recent California court expe-

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160. 20.4% of respondents were asked their sexual orientation directly. BREWER & GRAY, REPORT, *supra* note 28, at 29 (table 15).

161. BREWER & GRAY, REPORT, *supra* note 28, at 32.

162. Sixteen judges were asked to conduct voir dire about sexual orientation attitudes, fourteen permitted those questions. NJ REPORT, *supra* note 45, at 58.

163. For a discussion of conducting voir dire on sexual orientation see Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1 (2001).

164. See, e.g., CAL. JUD. ADMIN. STANDARDS, § 8(c)(16) (2000) (Appendix to Rule of Court, Division I Standards of Judicial Administration Recommended by the Judicial Council (Examination of Jurors in Civil Cases)):

It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a lifestyle different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?

*Id.*; see also *id.* § 8.5(b)(18) (Examination of Jurors in Criminal Cases).

Although the jury instruction mentions race, ethnicity and religion, it does not specifically address sexual orientation. Second, if the quoted material in parentheses was intended to capture sexual orientation, the use of "lifestyles" rather than "lives" when referring to gay people is problematic. The term connotes a conscious and socially unacceptable choice, and not merely another manner of living. Tellingly, courts had once described interracial marriages as a "lifestyle" to create the same marginalizing effect. See, e.g., *Palmore v. Sidotti*, 466 U.S. 429, 431 (1984) (citing the Record at 84) (the lower court changed custody from the mother because "the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society."). Currently, using "lifestyle" to describe an interracial marriage is strange and shows how much the view of marriage has changed in a quarter century. See *Brower*, *supra* note 2, at 79-82 (discussing *Palmore* and same-sex relationships). That it does not sound equally odd when applied to sexual minorities illustrates how salient sexual orientation identity is. Courts see lesbians or gay men in voir dire as distinct from others. This segregationist view is an error. In short, like their heterosexual counterparts, lesbians and gay men have lives, not lifestyles.

rience, forty-four percent of gay men and lesbians were jurors or venire panelists.<sup>165</sup> In that contact, 48.3 percent were asked if they were married.<sup>166</sup> Many respondents felt they could only reply incompletely or inadequately to that query.

The judge asked all prospective jurors to state marital status and what their spouse's occupation was. I have a long-term domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner's occupation even though legally my marital status is single. Stating 'single' would have felt like lying.<sup>167</sup>

The marital status question reinforces the assumption that individuals are heterosexual and either single, married, divorced or widowed.<sup>168</sup> Thus, the question may create the perception of bias or foster a feeling of invisibility in anyone whose life cannot be described by those categories. Unless specifically relevant to a case, the marital status inquiry may undermine the credibility of the judicial process in several ways. First, it

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165. Forty-four percent of gay men and lesbians participated either as a juror or in jury voir dire. BREWER & GRAY, REPORT, *supra* note 28, at 15 (table 5).

166. *Id.* at 15. 26.1 percent of all lesbian or gay court users were asked if they were married. *Id.* at 16 (table 6). At the time of the survey, California recommended that judges ask about marital status during standard voir dire questioning. For example: "Each of you should now state your name, where you live, your marital status (whether married, single, widowed or divorced) . . . . If you are married, you should also briefly describe your spouse's occupational history and present employer, if any." CAL. JUD. ADMIN. STANDARDS, § 8(c)(20) (2000). That standard has since been changed. *See Id.* § 8.5(b)(15). The current language is "'anyone with whom you have a significant personal relationship.' The term, 'anyone with whom you have a significant personal relationship' means a domestic partner, life partner, former spouse, or anyone with whom you have an influential or intimate relationship that you would characterize as important."

In contrast, only 6.8 percent were asked if they had a domestic partner. BREWER & GRAY, REPORT, *supra* note 28, at 16 (table 6). Some respondents were uncomfortable with that question as well: "I did not tell the truth about having a partner because I was not comfortable being 'out' in that setting. I pretended I was single – then 'passed' for heterosexual. I did not want my partner 'outed' – they asked name and profession of spouse or significant other." BREWER & GRAY, SURVEY DATA, *supra* note 10, at 21.

167. BREWER & GRAY, REPORT, *supra* note 60, at 20.

168. Namely, in the traditional heterosexual sense; even Vermont uses the term Civil Union for same-sex couples, and not Marriage. *See, e.g., Carey Goldberg, Gay and Lesbian Couples Head for Vermont to Make It Legal, but How Legal Is It?*, N.Y. TIMES, July 23, 2000, at 12; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (of course in Massachusetts, same sex couples can legally marry).



deprives the court and lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process. "In a domestic abuse case, the judge did not ask me the same questions she asked the other potential jurors regarding my relationship with my companion or domestic abuse."<sup>169</sup> "I was serving jury duty. Questions asked of straight jurors were not asked of me. Things that excluded 'married' people were not applied to gay/lesbian even with long time partners."<sup>170</sup>

Second, it forces the gay or lesbian juror or witness either to disclose their sexual orientation or answer the question narrowly according to its specific terms, leaving them to deny or be incomplete about their lives. As one survey respondent noted: "All prospective jurors were asked about marital status. I have been in a monogamous relationship [for] 33 years and consider myself married. It would have been wrong to deny my relationship but it would have been legal to do so. It would have been a very public 'outing!'"<sup>171</sup>

Third, the marital status question may foster a perception among gay and lesbian court users that their subsequent judicial experience may not be fully informed or fair. "I feel the court does not take sexual orientation seriously and excludes it as an issue, which may be a mistake under certain circumstances—assuming everyone is either single or married."<sup>172</sup> "Lawyers questioned jurors about relevant medical conditions of spouses and family with disregard for other relationships of gays, lesbians, and domestic partners. Judge did not clarify the lawyer's intent. The net effect: Our relationships don't count."<sup>173</sup>

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169. BREWER & GRAY, REPORT, *supra* note 28, at 20.

170. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 14 (response to question 36).

171. *Id.* at 14 (response to question 36); *see also id.* at 3 (response to question 16) ("The judge asked all prospective jurors to state marital status and what their spouse's occupation was: I have a long-term domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner's occupation even though legally my marital status is single. Stating 'single' would have felt like lying.")

172. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 16 (response to question 36).

173. BREWER & GRAY, REPORT, *supra* note 28, at 20.

The stigmatizing effects of court users' open LGBT identity cut across all the jurisdictions studied. Their treatment deteriorated once sexual orientation became salient, either as a characteristic of the court users themselves or as a function of the legal matter. Because many sexual minorities had fairly transient contacts with the judicial system, the choice to become visible was relatively binary; their sexuality was either open or hidden. Although not always, disclosure was often within their control—albeit sometimes forced through the legal process or direct inquiry. For court employees, however, the interaction between sexual orientation visibility and court experiences is more complex.

## B. *Court Employees*

### 1. Openness

When we view a multistable illusion, our minds switch back and forth between one figure and the other; we recontextualize what we see. For court employees, the courts alternate between being in places where legal matters are determined and being in places of employment; the context shifts here as well. Thus, visibility plays a similar, but more complicated, role in lesbian and gay court employees' experiences. Unlike court users, gay employees have repeated contact with the courts as their workplace. Thus, although not all felt pressure to hide their sexuality, no one described their experience with the courts as a sexual orientation-neutral event.<sup>174</sup> Similar also to the various images that diverse individuals see in multistable figures, different people have divergent court experiences. Like sexual minority court users, lesbian and gay court employees had very different perceptions and more negative experiences in the courts than did their heterosexual co-workers.

Like court users, most California and British court employees surveyed believed that lesbian and gay people were treated the same as any other employee.<sup>175</sup> Additionally, over seventy-

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174. Cf. BREWER & GRAY, SURVEY DATA, *supra* note 10, at 19 ("My jury service seemed to be a gay-neutral event."); *accord Id.* at 6 n.93 (response to question 16).

175. In the U.K., 59.6 percent of respondents agreed or strongly agreed with the statement: "Lesbian and gay employees are treated the same as any other employee." However, 37.5 percent disagreed or strongly disagreed with that statement. BREWER, 2003 UK REPORT, *supra* note 47, at 26 (table 29a). In California,

six percent of UK respondents and ninety-four percent of California employees believed that the court personnel policies were fair to lesbian and gay people.<sup>176</sup> Visibility of sexual orientation remains significant in this data as well. The predominant pattern for court employees is the deterioration in sexual minorities' treatment and perceptions of fairness when court workers are asked about their day-to-day experiences, specific observations, and the application of workplace policies. That pattern was repeated in the 2005 UK study<sup>177</sup> and in New Jersey.<sup>178</sup>

A significant percentage of court employees in all the jurisdictions reported that open lesbians and gay men received worse treatment.<sup>179</sup> When the gay or lesbian employee becomes more visible, employees believe workplace policies are applied less fairly.<sup>180</sup> 32.3 percent of all UK respondents thought that people used sexual orientation to devalue the credibility of some lesbian or gay employees. Moreover, 27.6 percent believe that openly gay or lesbian employees do not have the same chance of promotion as heterosexual employees, while 16.7 percent said it was harder to be hired if people suspect you are a LGBT person.<sup>181</sup> Finally, a small number [5.2 percent] believed that LGBT employees receive less favorable work assignments than do their heterosexual peers.<sup>182</sup> The 2005 data are similar, as

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88 percent of respondents agreed or strongly agreed with the statement: "Lesbian and gay employees are treated the same as any other employee." CA REPORT, *supra* note 39, at 39-40.

176. In the U.K., 76.8 percent of respondents agreed that their written workplace policies were fair to lesbian and gay men. BROWER, 2003 UK REPORT, *supra* note 47, at 26 (table 29e). In California, 94 percent of respondents agreed that their written workplace policies were fair to lesbian and gay men. CA REPORT, *supra* note 39, at 39.

177. BROWER, 2005 UK REPORT, *supra* note 47, at 20-21.

178. See, e.g., NJ REPORT, *supra* note 45, at 25 (question 1), 26 (question 2), 27 (question 3), 28 (questions 4-5).

179. See *infra* notes 229-37 and accompanying text. Other social science workplace studies confirm this finding, but are somewhat less absolute. See, e.g., Croteau, *supra* note 41, at 200-01 (discussing studies); but see Ragins & Cornwell, *supra* note 20, at 1256. Professor Ragins speculates that disclosure may lead to increased reports of discrimination in more hostile environments than the one she studied. *Id.*

180. BROWER, 2003 UK REPORT, *supra* note 47, at 33.

181. *Id.*

182. *Id.*

are the responses to the same questions asked of California employees.<sup>183</sup>

Axiomatically, disclosure of one's sexual orientation is necessary for direct discrimination based on sexual orientation to occur.<sup>184</sup> Like other workplaces, open lesbians and gay men often experience more discrimination and negative treatment.<sup>185</sup> For example, a California judicial worker stated, "I could never understand why all of a sudden I was treated with disrespect by management. Then a co-worker told me that she thought management hated gays and that they were told by a different co-worker that I was gay."<sup>186</sup> A New Jersey lesbian court employee heard rumors about her sexual activity, resulting in negative workplace treatment. "Although I was the most qualified, I was not [promoted] because [my supervisor] didn't approve of my lifestyle. I was advised of this information in confidence by another supervisor."<sup>187</sup>

British examples are similar. "When people became aware of my homosexuality, some people who I had previously called friends stop[ped] talking to me! Others talked but refused to acknowledge anything to do with what they had heard . . . ."<sup>188</sup>

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183. BROWER, 2005 UK REPORT, *supra* note 47, at 21-22; BREWER & GRAY, REPORT, *supra* note 28, at 70 (table 48). If a person is suspected of being lesbian or gay, 17.3 percent of California court employees stated that it is harder to be hired; 13.4 percent agreed that sexual orientation is used to devalue the credibility of some gay or lesbian employees; and 9.8 percent believed that anti-gay prejudice is widespread at work. BREWER & GRAY, REPORT, *supra* note 28, at 70 (table 48). Accord LA BAR REPORT, *supra* note 10, at 16, 19 (discussing evaluations, promotions and career paths for openly gay or lesbian attorneys).

184. See, e.g., Badgett, *Wage Effects*, *supra* note 20, at 728.

185. See Croteau, *supra* note 41, at 200-01 (reviewing studies of workplace discrimination). See also, e.g., HENNEPIN COUNTY REPORT, *supra* note 48, at 15-17, 26.

186. BREWER & GRAY, REPORT, *supra* note 28, at 59. Accord LA BAR REPORT, *supra* note 10, at 16, 19 (discussing evaluations, promotions and career paths for openly gay or lesbian attorneys); NJ REPORT, *supra* note 45, at 46 (question 20).

187. NJ REPORT, *supra* note 45, at 47, 54 (during another promotion review, after the supervisor noted in personnel files that "one female candidate had named another female in the unit as a primary beneficiary of an insurance [policy]. The news spread throughout the department like wildfire. The two women felt humiliated and resigned shortly thereafter.").

188. BROWER, 2003 UK REPORT, *supra* note 47, at 40 (open-ended comments Q17) ("I have no 'firm' evidence that this has happened - it is simply that the attitude of me [sic] particular colleague has changed considerably since he was told that I am gay. The sniggers, whispers, and 'appears' to be anti-gay—again, I can't prove this . . . .").

"[I]n short, 15 years ago I was offered the post of Principal Private Secretary of the Lord Chancellor; [I] came out; and the offer was withdrawn. . . . Since then, my sexual orientation has not been an issue in formal terms (although it has . . . affected some relationships)."<sup>189</sup>

The incident in question occurred a few years ago. My working relationship with a young, female line Manager broke down when she discovered I was gay. She was a very religious person. She had a very negative view of homosexuality as a result of her beliefs. Having previously worked together harmoniously before she discovered I was gay, she started to pick fault with me once she was aware. LCD personnel were very supportive.<sup>190</sup>

The salience of minority characteristics increases bias.<sup>191</sup> Individuals who stand out or are different from their peers are rated more extreme on a number of levels than are non-salient individuals.<sup>192</sup> Moreover, people remember and judge more harshly the undesirable behavior of out-group members than of in-group members.<sup>193</sup> They disproportionately attribute minority members' failures to personal characteristics, while majority members' failures are attributed to situations beyond the individuals' control.<sup>194</sup>

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189. *Id.* (open-ended comments Q26).

190. BROWER, 2003 UK REPORT, *supra* note 47, at 47 (open-ended comments Q26).

191. Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, at n.75, *forthcoming in* BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION (Mitu Gulati & Michael Yelnosky eds. 2006), *available at* [http://www.law.yale.edu/documents/pdf/Jolls\\_Antidiscrimination\\_Laws\\_Effects\\_on\\_Implicit\\_Bias.pdf](http://www.law.yale.edu/documents/pdf/Jolls_Antidiscrimination_Laws_Effects_on_Implicit_Bias.pdf) (last visited Feb. 6, 2007). For a discussion of the salience of lesbian and gay identity and its effects on legal doctrine, see Brower, *Courts and Closets*, *supra* note 14, at 565. Like other non-majority statuses within organizations, salience can change over time. *E.g., id.* at 590-91.

192. Krieger, *supra* note 51, at 1193 n.142. More familiarity with the different characteristic reduces the extremes in evaluations because those characteristics overshadow other elements less and judgments become more complex. *Id.* at 1195 n.151; Brower, *Courts and Closets*, *supra* note 14, at 627 nn.154-55 and accompanying text.

193. Krieger, *supra* note 51, at 1192.

194. *Id.*; accord Wilkins, *supra* note 37, at 1958 ("When white evaluate blacks, they frequently attribute negative acts 'to personal disposition, while positive acts are discounted as the product of luck or special circumstances'" (quoting Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1285 (1995))).

The distinctiveness of lesbian and gay identity helps explain these findings. More specifically, we do not separate out non-gay people; they are just “people” and not a group characterized by their sexual orientation or behavior.<sup>195</sup> Accordingly, we rarely perceive the sexual orientation of heterosexuals because we measure difference against that baseline.<sup>196</sup> For example, sexual orientation protections apply to gay and non-gay persons alike, but we usually do not notice that symmetry.<sup>197</sup> Non-gay people appear not to need that protection<sup>198</sup> because they do not appear different enough to provoke a negative reaction.<sup>199</sup> Unsurprisingly, few heterosexual court employees suffered negative treatment based on their sexual orientation.

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195. Some gay people refer to heterosexuals as “breeders.” *E.g.*, Rob Morse, *We’re here, we’re having a beer . . .*, SAN FRANCISCO EXAMINER, June 29, 1997, at A-2; Rich Kane, *AOHELL, Can A Gay Man Find Love Online?*, OC WEEKLY (Orange County, Ca), Apr. 4, 1997, at 8; Michael J. Ybarra, *Odd Man In: Businessman Gavin Newsom Is the Latest Addition to S.F.’s Board of Supervisors. His Biggest Selling Point? The Fact That He’s A Straight White Male – A Relatively Rare Commodity In That City*, L.A. TIMES, Mar. 31, 1997, at E1; Edward Porter, *Nine Dead Gay Guys*, TIMES NEWSPAPERS (U.K.), Sept. 21, 2003, at 12 (reviewing movie from the perspective of a “boring old Breeder”); accord Kevin Courtney, *The Straight Talk, There’s never been a better time to be a gay Irishman. I hate to say it, guys, but being straight is sooo last season*, THE IRISH TIMES (Ireland), Nov. 24, 2001, at 61 (using the term in Ireland as an ‘affectionate term’ by gay people for non-gays). The rhetorical impact of that term illustrates the pejorative, misleading, and stigmatizing effect of a view that reduces people to one facet of their assumed sexual activity.

196. Indeed, “heterosexual” did not appear in English until preceded by, and perhaps, in contradistinction to, “homosexual.” David Halperin, *Sex Before Sexuality: Pederasty, Politics and Power in Classical Athens*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 37-39 (Martin Duberman et al. eds., 1989).

197. *Romer v. Evans*, 517 U.S. 620, 638-39 (1996) (Scalia, J., dissenting) (a striking example of this inattention in his description of Amendment 2 as merely banning special rights for gay people and returning Colorado law to neutrality). Purely descriptively, he misstates the effect of the Colorado law. Each of the ordinances affected by the amendment, e.g., Aspen, Boulder, Denver, and the state Executive Order, barred discrimination on the basis of sexual orientation. *Id.* at 623-24, 626-27 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993) (*Evans I*)). Amendment 2 prohibited anti-discrimination provisions based on homosexual, lesbian, or bisexual orientation only. COLO. CONST. art. II, § 30b; *Romer*, 517 U.S. at 624. Thus, heterosexuals, as heterosexuals, would have remained protected against sexual orientation discrimination under these ordinances; gay people would not.

198. *Cf. id.* at 631.

199. *But see, e.g.*, Susan Ferriss & Erin McCormick, *When a kiss isn’t just a kiss: Castro bar tosses straight smoochers*, SAN FRANCISCO EXAMINER, Mar 9, 1997, at A-1 (gay bar owner ejects man and woman for kissing, SF Human Rights

All the court reports also found a significant disparity in the personal work experiences of gay and lesbian versus heterosexual employees. California lesbian and gay employees were over five times more likely to experience negative actions, discrimination, or hear comments based on sexual orientation than were heterosexual employees.<sup>200</sup> Thirty percent of all New Jersey respondents and seventy-eight percent of lesbian and gay respondents heard a co-worker, supervisor or judge make a derogatory statement or an inappropriate joke about homosexuals.<sup>201</sup> Moreover, fourteen percent of all judicial employees and forty-nine percent of lesbian and gay workers heard those remarks or jokes about a person in the office because that person was or was perceived to be lesbian or gay.<sup>202</sup> UK court employees rated the court system as less fair to LGBT people than to the general population.<sup>203</sup> This last finding was echoed in the California study. California employees rated the courts less fair

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Comm'n orders gay bar to change anti-heterosexual kissing policy to comply with sexual orientation discrimination prohibitions); *Straights complain of intolerance by gays in Provincetown*, THE PROVIDENCE JOURNAL (R.I.), July 27, 2006, at A-09 (anti heterosexual comments made in a gay-friendly municipality).

200. While 3.4% of non-gay court employees reported hearing negative comments based on their sexual orientation in the last year, 20.4% of lesbian and gay court employees reported hearing such comments. Just 3.2% of non-gay employees reported their sexual orientation being the subject of jokes or ridicule, while 16.2% of lesbian and gay employees reported such incidents; only 2% of non-gay employees reported verbal abuse based on their own sexual orientation, while 12.5% of lesbian and gay court employees reported such abuse. BREWER & GRAY, REPORT, *supra* note 28, at 62 (table 40). Similarly, 2.5% of non-gay employees reported experiencing negative actions based on sexual orientation, compared with almost 15.7% of lesbian and gay male employees. Finally, 12.9% of lesbian and gay employees report being called derogatory names based on their own sexual orientation, compared with 1.7% of non-gay employees. *Id.* Finally, one in five lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their work place based on their sexual orientation. Merely two percent of the non-gay employees reported being discriminated against based on sexual orientation. *Id.* Accord BROWER, 2005 UK REPORT, *supra* note 47, at 38-39.

201. NJ REPORT, *supra* note 45, at 43 (question 16).

202. *Id.* at 43 (question 17).

203. On a scale of 1 to 10, with higher scores indicating higher levels of fairness, respondents rated the court system with a mean score of 5.83 on fairness to lesbians and gay men while they rated the courts with a mean score of 6.91 for fairness to people in general. See BROWER, 2003 UK REPORT, *supra* note 47, at 34-35; BROWER, 2005 UK REPORT, *supra* note 47, at 26-27 (2005 respondents rated the courts with a mean score of 5.66 on fairness to lesbians and gay men and 6.13 for fairness to people generally).

to lesbians and gay men than to people generally, with sexual orientation minorities rating the courts significantly lower than their non-gay colleagues.<sup>204</sup>

One court employee stated, “[t]here were quite a few gay men who worked at our court and were openly harassed because of it.”<sup>205</sup> One gay employee noted, “I’ve heard derisive references such as ‘faggot’ from judges, co-workers, and bailiffs. Questions have been asked of me re: flowers/gardening and other areas where gay men are stereotyped.”<sup>206</sup> Another employee reported, “[w]hen helping lesbians or gays some of the clerks handle their paperwork touching only the tips or edges of the paper. One stated, ‘[y]ou never know what they did or touched.’”<sup>207</sup>

Besides correlating with negative treatment, visibility also affected court employees in other ways. People expected lesbian and gay employees to keep their sexual orientation hidden.<sup>208</sup> Sixteen percent of lesbian or gay New Jersey respondents and two percent of all court employees heard a co-worker, supervisor or judge criticize an employee or applicant for openly identifying him or herself as lesbian or gay.<sup>209</sup> Twenty-one percent of lesbian or gay employees and one percent of all employees reported that someone in their office was advised or asked to conceal their sexual orientation.<sup>210</sup> The 2003 UK report concluded that 41.7 percent believe that it is unsafe for lesbians and gay men to be open about their sexual orientation at work, while 26.1 percent think that LGBT employees should keep their sexual orientation to themselves there.<sup>211</sup>

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204. Heterosexuals rated the courts with a mean score of 7.88 (out of 10) for fairness to lesbians and gay men and 7.98 in fairness to people in general. Lesbians and gay men rated the courts with a mean score of 6.44 in fairness to sexual orientation minorities and 7.15 to people generally. CA REPORT, *supra* note 39, at 40.

205. BREWER & GRAY, REPORT, *supra* note 28, at 48.

206. *Id.* at 49.

207. *Id.*

208. *Id.* at 70 (table 48), 71 (table 49).

209. NJ REPORT, *supra* note 45, at 44 (question 18).

210. *Id.* at 44 (question 19) (co-workers were responsible for the majority of this treatment).

211. BROWER, 2003 UK REPORT, *supra* note 47, at 30 (tables 29l, 29h, 29b, and 29k).



Gay and non-gay people also perceive differently the risks and benefits of disclosing one's sexual orientation in court. A greater percentage of heterosexual UK court employees thought that LGBT persons were able to be open about their sexual orientation at work, than did non-heterosexuals—with bisexuals and transgendered persons expressing the most caution about openness.<sup>212</sup> Remember that the heterosexual UK respondents surveyed were all "friends of the Rainbow Network," a group characterized by their interest in and sensitivity to sexual orientation issues.<sup>213</sup> If those persons undervalued the risks in disclosing one's sexual orientation at work,<sup>214</sup> we should see even stronger disparities in the more randomly drawn New Jersey and California court employee samples. Indeed, on virtually every question in which the data was separated by respondents' sexual orientation, gay men and lesbians in the

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212. 80 percent of bisexuals agreed or strongly agreed that it is better for LGBT people to keep their sexuality to themselves at work, compared to 50 percent of transgendered individuals, 25 percent of lesbians and gay men, and 16 percent of heterosexuals. *Id.* at 30. In addition, nearly twice as many men as women agreed or agreed strongly with that statement. Men 30.7 percent, women 15.2 percent. BROWER, 2003 UK REPORT, *supra* note 47, at 30.

The reasons for these differences are obscure. Male homosexuals and bisexuals may perceive more hostility towards them in the workplace than do female homosexuals and bisexuals. Lesbian invisibility and the stronger negative reactions to male homosexuality may also play a role. On lesbian invisibility, see Julie Shapiro, *Custody and Conduct, How the Law Fails Lesbian and Gay Parents and their Children*, 71 IND. L.J. 623, 648 (1996) (discussing the sometimes positive effects of lesbian invisibility). For gender hostility differences between society's views of male and female homosexuals, see Mary Ann Case, *Disaggregating Gender From Sex and Sexual Orientation, The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 63-64 (1995); Note, *Ninth Circuit Holds That Male Coworkers' and Supervisor's Harassment of Male Employee for Failing To Meet Sex Stereotype Constitutes Sex Discrimination*, 115 HARV. L. REV. 2074, 2080 nn.49, 52 (2002); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). Moreover, other studies have shown that men as a group tend to express more prejudice against people from other groups than do women. See, e.g., STONEWALL, *supra* note 51, at 23 (race), 25 (lesbians and gay men), 27 (other prejudice).

213. BROWER, 2003 UK REPORT, *supra* note 47, at 64.

214. As with general perceptions of fairness, specific beliefs about LGBT persons in the DCA improved between 2005 and 2003. However, heterosexuals still tended to have more positive attitudes about sexual orientation fairness than did LGBT persons. In 2005, heterosexuals believed that their co-workers were sensitive to diversity more often than did LGBT respondents (80.4% to 63.7%). That same difference was reflected in attitudes about whether co-workers included sexual orientation when they discussed workplace diversity (68.7% to 57.9%).

Garden State reported worse experiences or observations than did their heterosexual counterparts when reporting on negative treatment based on minority sexual orientation.<sup>215</sup>

Despite the strong correlation between sexual orientation openness and adverse treatment as well as the significant co-worker sentiment that minority sexuality should remain hidden, the data on court worker visibility is not uniformly negative. Openness about one's sexual orientation appears to correlate positively with some fairness perceptions.<sup>216</sup> In 2003, British respondents who were more open at work believed that it was unnecessary to keep one's sexual orientation quiet in that setting.<sup>217</sup> This same pattern also appeared when they were asked: (1) if an open LGBT person would have a harder time being hired;<sup>218</sup> (2) if people made jokes about LGBT persons behind their backs;<sup>219</sup> and (3) whether prejudice was widespread at work.<sup>220</sup> In 2005, a larger percentage of open British lesbian or gay court employees reported that the court's policies were

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215. NJ REPORT, *supra* note 45, at 26-31, 35, 37-40, 43-44, 56-57; *but see Id.* at 54 (question 15: satisfaction after reporting bias).

216. *Accord* Croteau, *supra* note 41, at 201 (discussion two studies that found a correlation between openness and fairness perceptions).

217. Respondents agreed or strongly agreed with the statement, "[i]t is better if LGBT people keep their sexual orientation to themselves whilst at work," as follows: totally out at work (17.7 percent), selectively out at work (33.3 percent), not out at work (77.7 percent). BROWER, 2003 UK REPORT, *supra* note 47, at 30-31 (table Q29k, Q44a).

218. Totally out at work (15.7 percent), selectively out at work (23.8 percent), not out at work (33.3 percent). BROWER, 2003 UK REPORT, *supra* note 47, at 31 (table Q29j, Q44a).

219. Totally out at work (49 percent), selectively out at work (61.9 percent), not out at work (77.8 percent). BROWER, 2003 UK REPORT, *supra* note 47, at 31 (table Q29l, Q44a).

220. Totally out at work (17.7 percent), selectively out at work (23.8 percent), not out at work (33.3 percent). BROWER, 2003 UK REPORT, *supra* note 47, at 31 (table Q29h, Q44a). Alternatively, the apparent risks of disclosure may lessen with the size of the group into which one falls. Heterosexuals naturally are the largest group of DCA employees, with lesbians and gay men perhaps having sufficient numbers to make it relatively relaxed to come out in that setting. Finally, the small numbers of bisexual and transgendered respondents may make their perceptions of risk much higher.

fair to LGBT people.<sup>221</sup> Other workplace studies also evidence this correlation.<sup>222</sup>

Perceptions of treatment may improve as one becomes more visible about sexual orientation, even if actual treatment did not necessarily do so. Because the study data reflect correlation and not causation, however, we may only cautiously assign cause and effect. Conceivably, better perceptions of fair and equal treatment based on sexual orientation may lead to increased openness about respondents' sexuality, rather than the other way around.<sup>223</sup> Cause and effect may also run in both directions at the same time.<sup>224</sup>

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221. BROWER, 2005 UK REPORT, *supra* note 47, at 24-25 (totally open agree: 80%; disagree: 12.5%; selectively open agree: 73%; disagree: 4.3%; not open agree: 50%; disagree: 0%).

222. Openly lesbian or gay employees were more committed to their workplaces, had higher job satisfaction, and lower conflict between work and home. Nancy E. Day & Patricia Schoenrade, *The relationship among reported disclosure of sexual orientation, anti-discrimination policies, top management support and work attitudes of gay and lesbian employees*, 29 PERSONNEL REV. 346, 351-52 (2000). Openly gay or lesbian workers are more satisfied with that degree of openness than are less visible employees. Croteau, *supra* note 41, at 201 (discussing studies).

223. Other workplace studies found that lesbian and gay employees were less likely to disclose their sexual orientation when they reported experiencing or witnessing discrimination. Ragins & Cornwell, *supra* note 20, at 1256; Croteau, *supra* note 41, at 199-200. The California Report found evidence that negative treatment affected one's comfort in disclosing sexual orientation. "One man in particular made gestures and anti-gay comments. Others would nod in agreement it was very scary to come out in that environment. The judge did dismiss this man after a while." Brower, *supra* note 14, at 56; *see also* NJ REPORT, *supra* note 45, at 48-49.

At least one California court user respondent specifically reported that he or she passed as heterosexual rather than be subjected to mistreatment as gay or lesbian. Brower, *supra* note 14, at 48-49. A British court employee engaged in the same strategy. BROWER, 2003 UK REPORT, *supra* note 47, at 59-60 (open-ended comments, Q10); *see also* BROWER, 2005 UK REPORT, *supra* note 47, at 26 (open-ended comments Q15) ("[I] feel it worth mentioning that when I worked at another government dept. some 3 or so years ago, I was subject to many of the above incidents [of negative treatment] - hence, since returning (from loan) to DCA, I have decided to keep quiet about my sexuality - just in case!"). A New Jersey court employee also lied about his sexual orientation. NJ REPORT, *supra* note 45, at 48-49; *accord* LA BAR REPORT, *supra* note 10, at 27 ("most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream"); *id.* at 27 n.179 (one lesbian lawyer married in order to make partner).

224. *See, e.g.,* EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH*, (Wadsworth Publishing Co., 5th ed. 1989).

However, we must be cautious about this interpretation. Alternatively, colleagues may simply hide their prejudices when an openly gay person is present.<sup>225</sup> Employees who were not visible heard more jokes about sexual minorities behind their backs and perceived more widespread prejudice in the workplace than did their more open colleagues.<sup>226</sup> Visibility sometimes pushes bias underground. "I hope they will begin to think about what they are saying, as I confront their behaviour every time. I am worried though, that they will just stop saying things in front of me, which means I can no longer try to change their behaviour and/or attitudes."<sup>227</sup>

Courts should worry about what this interpretation portends. Bias and prejudice may not be eliminated; they may merely be hidden until co-workers believe it is safe to express them after an open gay person has left the room.<sup>228</sup> Because not all sexual minorities are visible, LGBT people may be present even when they are not openly identified. A biased workplace environment may affect invisible sexual minorities and heterosexuals, as well as openly identifiable gay persons.<sup>229</sup>

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225. 40.4 percent of California court employees acknowledge that people make jokes or comments about gay people behind their backs. BREWER & GRAY, REPORT, *supra* note 28, at 70 (table 48). In the 2005 UK study, 46.9 percent stated that people made jokes or comments about LGBT people behind their backs. BROWER, 2005 UK REPORT, *supra* note 47, at 23.

226. See BROWER, 2003 UK REPORT, *supra* note 47, at 31 (tables Q29I, Q44a, Q29h and Q44a).

227. *Id.* at 39 (open-ended comments Q13); see also, e.g., BROWER, 2005 UK REPORT, *supra* note 47, at 44 (open-ended comments Q12.7) ("I am a senior manager: a) if I confront someone about an action, they usually stop – that's good; b) but they don't really debate the issue and their actions may just go 'underground' – no idea if that's an improvement."); *id.* at 31 (open-ended comments Q10) ("Although general atmosphere is one of tolerance + respect, 'sniggering culture' does remain - I experienced this when not out, but when out have noticed it less. This, for me, demonstrates that there does exist a residual unease with LGBT issues.").

228. See also NJ REPORT, *supra* note 45, at 49 ("Several gay or lesbian respondents said that because co-workers and others do not know that they are gay, they feel free to make gay jokes in their presence.").

229. Both US and UK employment law make employers and employees responsible for harassment. See, e.g., U.S. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Harris v. Forklift Sys., 510 U.S. 17 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); Employment Equality (Sexual Orientation) Regulations, 2003, SI 2003/1661 (UK) (effective Dec. 1 2003) (England, Wales, Scotland); see also EXPLANATORY NOTES: PROTECTION AGAINST DISCRIMINATION AT WORK ON GENDER AND SEXUAL ORIENTATION 13-14 n.54 (Dep't of Trade & Indus. Dec. 2003) (same); Employment Equality (Sexual Orientation) Regulations, 2003,

## 2. Hiding or Passing

To avoid the negative treatment discussed above, another option for lesbian and gay men in the courts is to hide their sexuality or pass as heterosexual. Unlike court users who may have only fleeting or sporadic contact with the judicial system, court employees have repeated workplace experiences. Accordingly, the costs of remaining invisible increase. Forced passing can lead to painful choices. One Los Angeles lesbian attorney married in order to make partner.<sup>230</sup> Some UK employees' negative experiences in prior jobs meant that they would not disclose their sexual orientation in their current court employment.<sup>231</sup> Other California court employees report feeling invisible or being shunned by co-workers after they complained about different treatment of gay people.<sup>232</sup> Most telling of all,

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SI 2003/479 (N. Ir.). Harassment includes name-calling, teasing, nicknames or upsetting behaviors, even without malicious intent. Moreover, behavior is actionable although not targeted at specific individuals if it leads to a general culture that appears to tolerate the telling of homophobic jokes or other similar activities. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (holding that the objective severity of harassment should be evaluated by the reasonable person standard while considering "all of the circumstances" and the "social context" in which the alleged harassing conduct occurred); *Harris*, 510 U.S. at 21, 23 (reaffirming that Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment and designating relevant factors that might indicate the existence of a hostile work environment); SEXUAL ORIENTATION IN THE WORKPLACE: A GUIDE FOR EMPLOYERS AND EMPLOYEES 9 (Advisory, Conciliation & Arbitration Service (ACAS) 2003), available at [http://www.acas.org.uk/media/pdf/e/n/sexual\\_1.pdf](http://www.acas.org.uk/media/pdf/e/n/sexual_1.pdf) (the ACAS is a taxpayer-funded, public body). The Department of Trade and Industry approvingly referred to the ACAS's interpretation of the 2003 Employment Equality (Sexual Orientation) Regulations. EXPLANATORY NOTES: PROTECTION AGAINST DISCRIMINATION AT WORK ON GENDER AND SEXUAL ORIENTATION 14-22 nn.47-56 (Dep't of Trade & Indus. Dec. 2003).

230. LA BAR REPORT, *supra* note 10, at 27 n.179.

231. BROWER, 2005 UK REPORT, *supra* note 47, at 26 (open-ended comments Q15). This action is confirmed by social science studies. See, e.g., Beth E. Schneider, *Coming Out At Work: Bridging the Private/Public Gap*, 13 WORK AND OCCUPATIONS 463-87 (Nov. 1986); Badgett, *Wage Effects*, *supra* note 20, at 728.

232. BREWER & GRAY, REPORT, *supra* note 28, at 60 ("It's like I don't exist anymore. . . . Made me feel uncomfortable. Fewer invitations to group lunches, etc."). Accord NJ REPORT, *supra* note 45, at 54. (open-ended comment that after reporting anti-lesbian harassment to management, that employee "became even more of a pariah . . . [and eventually] resigned under the pressure and strain of the ordeal"); LA BAR REPORT, *supra* note 10, at 32 (discussing the choice of confronting or acquiescing in anti-gay behaviors).

some employees did not report incidents of anti-gay behaviors because they feared others would think they were LGBT.<sup>233</sup>

I took relatively little action as I was worried & still am that people would guess / find out about my transsexuality as I am not out & may not be ready to be out at work for fear of widespread ridicule & prejudice. I saw & heard the reaction to someone who now presents as a woman in HQ.<sup>234</sup>

One New Jersey respondent detailed how he or she either kept quiet or even participated in anti-gay comments so as to deflect suspicion that he or she was gay.<sup>235</sup>

Nevertheless, as other responses indicate, some gay and lesbian employees believe that the bias evident in the courts requires them to keep completely quiet about their sexual orientation.<sup>236</sup> "A gay court employee stated that having heard words like "faggot" and "queer" directed at others in the office made him believe "that 'coming out' in [his] office will subject [him] to comments and increased scrutiny."<sup>237</sup>

As a gay employee there is not much that I can say about this delicate subject because I cannot even be myself at my place of employment. I have to lead two different lives. Sometimes my co-workers ask me if I have a girlfriend, if I am married, how many children I have, and I have to answer with a lie. All this makes me feel very unhappy. In addition, sometimes the people that I work with make fun of gay people in front of me, and I have to

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233. 7.1% of California court employees, who experienced incidents of negative behaviors at work and did not report them, did not do so because of this fear. BREWER & GRAY, REPORT, *supra* note 28, at 64 (table 43). 2.8% of employees, who observed such treatment in open court, did not report it for this reason. *Id.* at 54 (table 33). 2.3% of employees, who observed such behavior other than in open court, did not report it for this reason. *Id.* at 58 (table 38). In the UK, 9.1 percent did not intervene out of concern that they would be thought to be gay or lesbian. BROWER, 2003 UK REPORT, *supra* note 47, at 39; *see also* NJ REPORT, *supra* note 45, at 54.

234. BROWER, 2003 UK REPORT, *supra* note 47, at 39 (open-ended comments Q15).

235. *See* NJ REPORT, *supra* note 45, at 48.

236. This is consistent with the findings of Belle Ragins and her colleagues. Gay or lesbian colleagues who perceived greater workplace discrimination were more likely to conceal their sexual orientation than those who reported less discrimination. Ragins & Cornwell, *supra* note 20, at 1252.

237. NJ REPORT, *supra* note 45, at 48, 49 ("I have heard people make rude comments about female sheriffs officers, openly gossip about 'suspected people. I have heard the terms 'fag' and 'dyke' used openly. Anyone who is gay would understandably be afraid in this atmosphere.").

laugh about it and pretend that it does not bother me . . . . I have a co worker who is gay too; this person lives in a fantasy world and lives in a constant fear that people will find out that he is gay. What I am trying to say here is that it is not very easy to be gay and work in the judicial system. I do not think there are very many gay employees of the court who openly identify themselves as lesbian or gay.<sup>238</sup>

Finally, one state-employed attorney said:

I am not open about my lifestyle at my job for fear of retaliation and/or job loss. I have appeared in many of the different county courthouses as a part of my State job. I have heard and seen, countless times, gay/lesbian jokes, comments, disparaging looks, mocking behavior, etc. I have seen many instances of discrimination towards gays and lesbians in the New Jersey courts . . . . The system is in desperate need of reform and education. How surprised all the judges and lawyers I deal with on a continuing basis would be if I was allowed to be open and honest about my life.<sup>239</sup>

Despite co-workers' recommendations to hide minority sexual orientation to avoid discrimination, even successful passing as heterosexual results in job-related, economic effects.<sup>240</sup> Passing can lead to higher absenteeism or job turnover<sup>241</sup> and the energies involved in passing may reduce productivity or increase stress.<sup>242</sup> Moreover, the conscious effort involved in passing

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238. *Id.* at 48-49.

239. *Id.* at 49.

240. Badgett, *Wage Effects*, *supra* note 20, at 728 (citing Jeffery Escoffier, *Stigmas, Work Environment, and Economic Discrimination Against Homosexuals*, 2 *HOMOSEXUAL COUNSELING J.* 1, 8-17 (1975)); RICHARD MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW* (1988).

Building on Mohr's work, Badgett suggests that a different strategy, over-compensating by being super-competent and super-productive, may have positive economic effects. Badgett, *Wage Effects*, *supra* note 20, at 728, (quoting Mohr, *supra* note 254, at 149); *accord* Wilkins, *supra* note 37, at 1932-33 (describing the strategy of an African-American attorney). For a view that the best way for minority or outsider workers to overcome stereotypes is to work harder and more productively, see Amy Wax, *Discrimination As Accident*, 74 *Ind. L.J.* 1129, 1202-03 (1999); *but see* Carbado, *supra* note 31, at 1288 n.80 (criticizing Wax).

241. Ragins & Cornwell, *supra* note 20, at 1248; *accord* BROWER, 2003 *UK REPORT*, *supra* note 47, at 48 (open-ended comments to Q24.8, 25.6).

242. Escoffier, *supra* note 254, at 8-17; *see also, e.g.*, HENNEPIN COUNTY REPORT, *supra* note 48, at 18; LA BAR REPORT, *supra* note 10, at 28 ("I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say 'we' and risk someone asking who 'we' is . . . . [I]f someone asks, 'what happened this weekend?' and I slip and [say] 'we' instead of 'I,' then I go through a

also means avoiding potentially awkward workplace social interactions where sexual orientation may be exposed or made express.<sup>243</sup> As one large firm attorney said,

I knew that I would lose work if any of the partners found out that I was gay. I did not reveal this fact to anyone except my closest friends at the firm. I was conscious of having to remain somewhat distant to most people. I did not get close to people because in their natural course of conversation most people talk about their spouses and families and I had resolved never to lie by fabricating an opposite-sex spouse . . . . I only spoke about work-related matters, never joined any group of co-workers for a drink, and never went to any firm events except those that were absolutely obligatory, and then I left as soon as possible.<sup>244</sup>

### 3. Minimizing Minority Sexual Orientation

As the last comment noted, lesbians and gay men can minimize social interactions to avoid disclosing information that would reveal sexual orientation. Whether this is perceived as passing as heterosexual or minimizing sexual orientation difference depends on the knowledge of co-workers.<sup>245</sup> Like the opening optical illusion, what you observe depends on the knowledge and perceptions of the viewer.

The New Jersey Report stated that most people believed that homosexuality was a private matter and ought not be revealed in the workplace.<sup>246</sup> One respondent commented that keeping quiet about their sexuality is a choice that most sexual orientation minorities would prefer. "Gays and lesbians do not wear badges of identification; most would prefer to 'blend in.'"<sup>247</sup>

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kind of turmoil. That really requires energy that . . . prevents you . . . from achieving any peace and assurance.").

243. Badgett, *Wage Effects*, *supra* note 20, at 728. *See also*, e.g., HENNEPIN COUNTY REPORT, *supra* note 48, at 18, 30, 37.

244. HENNEPIN COUNTY REPORT, *supra* note 48, at 37. *See also* NJ REPORT, *supra* note 45, at 48 (quoting court employees comments on their choices and actions to hide their sexuality).

245. *See supra* note 35 and accompanying text.

246. NJ REPORT, *supra* note 45, at 47; *see also Id.* ("They sometimes try and come on to you. If they are gay, they should keep it to themselves. I don't care one way or the other").

247. *Id.* This belief may be false, however. *See*, e.g., HENNEPIN COUNTY REPORT, *supra* note 48, at 32 ("The thing that concerns me most about my firm is a general attitude that being gay is simply not an issue and shouldn't even be addressed in the work context. This attitude pervades to the extent that I personally



Nevertheless like passing as heterosexual, blending-in or downplaying one's sexual orientation is not cost-free. As a Minneapolis lawyer noted, "[if you want to succeed in this firm], get a wife, get a Lexus, get a mortgage."<sup>248</sup> As with hiding, avoiding social interactions that might highlight differences between gay and non-gay employees may mean that others perceive lesbian and gay co-workers as standoffish or abnormal.<sup>249</sup> Some gay or lesbian court employees report that others forced them to dampen their minority sexuality in workplace social settings by reducing invitations so that a same-sex partner would not attend.<sup>250</sup> This latter experience is particularly significant because engaging in social interactions in parity with their heterosexual co-workers is one of the employment practices that had the strongest inverse relationship to perceived discrimination.<sup>251</sup> Finally, not participating in these events equally may mean that gay court employees fail to develop collegial or

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feel pressure not to raise 'gay' issues, even when it otherwise seems appropriate to do so").

248. *Id.* at 21. As the managing partner in a major Minneapolis firm noted, "[hiding sexual orientation makes it] virtually impossible for them [gay and lesbian lawyers] to participate fully in the culture of the workplace environment. Over time, many are driven away from their practice environments, resulting in lost opportunities for both the employee/attorney and the employer." *Id.* at 30.

249. "[At social events] gay and lesbian attorneys are most likely to feel and be perceived as 'different' – usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious . . . not fitting in." LA BAR REPORT, *supra* note 10, at 33 (quoting response from a gay or lesbian attorney respondent). See also NJ REPORT, *supra* note 45, at 48 (quoting court employees comments on their choices and actions to hide their sexuality); HENNEPIN COUNTY REPORT, *supra* note 48, at 33-34 ("When I was hired only one associate knew I was gay . . . . Even though the situation went well for the first three years, it was apparent to everyone that I just did not fit in socially with most other lawyers in the firm . . . . After a while it seemed obvious that a few of the partners would have been a lot happier if I just went elsewhere").

250. Accord BROWER, 2003 UK REPORT, note 47, at 37 ("Not invited to senior office meetings, as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited)").

251. Ragins & Cornwell, *supra* note 20, at 1255-56. Although disclosure of sexual orientation was higher when there were gay-protective legislation in the jurisdiction and gay-supportive policies at work, neither was as significant as welcoming social interactions. *Id.* at 1252. The presence of gay colleagues was related to disclosure, but having gay supervisors were not, nor was diversity training. *Id.* at 1252.

mentoring relationships important for advancement.<sup>252</sup> Accordingly, minimizing one's sexual orientation can sometimes be a counter-productive strategy in the courts.

## V. Conclusion

Whether lesbians or gay men opt to be open, to be invisible, or to minimize their sexual orientation, each decision carries consequences for their treatment and experiences in the courts. It is inappropriate to study the data on LGBT persons and the judicial system without considering visibility and disclosure of minority sexuality. Once uncovered, minority sexual orientation persists as salient and affects the experiences and treatment of lesbian and gay court users and court employees, although it operates slightly differently for each group. It is "a pattern that once seen, cannot be unseen."<sup>253</sup>

In the opening multistable illusion, whether you see an old woman or a young one depends on where you focus in the image and how you sort the visual information. The illustration itself does not change; only our perception of what it shows is altered. The analogy to sexual orientation minorities' experiences in the courts is that shifting perspectives leads to a diverse analysis of the data. We see divergent pictures of how lesbians and gay people are treated in the courts depending on whether we ask for the observations of heterosexuals or gay people. Even more significantly, we get a very different image when we focus on how visible sexual orientation becomes in the court, either as a topic in a court proceeding or as a characteristic of court users and court personnel. Accordingly courts and those who study the treatment of sexual minorities in the judicial system must

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252. See, e.g., *id.* at 1256; ROSABETH M. KANTOR, *MEN AND WOMEN OF THE CORPORATION* (1977). For discussion of gay glass ceilings, see Jeff Frank, *Gay Glass Ceilings*, Discussion Papers Series 2004-20 (Royal Holloway, Univ. of London 2004), available at <http://ideas.repec.org/p/hol/holodi/0420.html> (last visited Feb.7, 2007). Moreover, anti-lesbian bias may be present even as women combat gender discrimination. See Sherianne Shuler, *Breaking Through the Glass Ceiling Without Breaking a Nail: Women Executives in Fortune Magazine's "Power 50" List*, 6 AM. COMMUNICATION J. 6 (2003) (discussing how women successful at breaking gender glass ceilings are always depicted as traditional female gender conforming to avoid the association with homosexuality).

253. See Brian Boyd, *Nabokov As Storyteller*, in *THE CAMBRIDGE COMPANION TO NABOKOV* 45 (Julian W. Connolly ed., 2005).

not only examine sexual orientation, but also the visibility of that identity. Only then will an accurate, multifaceted picture emerge of LGBT persons' experiences in court.